Supreme Court, U.S.
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No. OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

BAY HARBOUR ASSOCIATES, L.P., HUNTINGDON SQUARE ASSOCIATES, L.P., ROCHESTER ASSOCIATES, L.P., VERLEYE & JERICHO ASSOCIATES, L.P., and RIVERWOOD LA PLACE ASSOCIATES, L.L.C.,

Petitioners,

v.

LEUCADIA NATIONAL CORPORATION, LEUCADIA, INC and LUK-SHOP, L.L.C.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does Chapter 11 of the United States Bankruptcy Code require that courts, in interpreting a debtor's court-approved, post-petition contract, designed to achieve restructuring of the debtor's obligations, should (a) strive to avoid liquidation of the debtor's estate or forfeiture of the debtor's property, and (b) make every effort, in the context of contract interpretation, to adopt an interpretation that would afford the debtor a fresh start, thereby satisfying Chapter 11's primary goal of rehabilitation?

2. Did the lower courts disregard the purpose of Chapter 11 as they each adopted an interpretation of the court-approved contract that insured liquidation of the debtor's estates, rather than one that would have achieved reorganization?

3. Assuming two reasonable but conflicting interpretations of a Chapter 11-court-approved-reorganizing contract, must the court adopt the interpretation most likely to avoid a liquidation of the debtor's property, and afford the debtor a fresh start?

4. The central purpose of Chapter 11 of the Bankruptcy Code is to afford a debtor a fresh start and avoid liquidation of the debtor's assets. Did the lower courts disregard the often-quoted maxim - "the law abhors forfeiture" - when they each adopted an interpretation that made forfeiture inevitable, despite the availability

of an interpretation supported by the contract's clear and unambiguous language and one that would have avoided forfeiture, and effectuated the purpose of the Chapter 11 Bankruptcy Code?

LIST OF THE PARTIES

5. The parties appear in the caption of the case on the cover page:

Petitioners:

Bay Harbour Associates, L.P.
Huntington Square Associates, L.P.
Rochester Associates, L.P.
Verleye & Jericho Associates, L.P.
Riverwood La Place Associates, L.L.C.

Respondents:

Leucadia National Corporation
Leucadia, Inc.
Luk-Shop LLC

6. There are no parties not listed in the caption that were parties to the proceeding in the court whose judgment is the subject of this Petition.

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The Petitioners[1] respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals, Second Circuit:

JUDGMENTS BELOW:

The Petitioners - all debtors that filed respective bankruptcy petitions under Chapter 11 of the United States Bankruptcy Code - commenced an adversary proceeding against the Respondents[2] seeking, among other things, an interpretation and specific performance of a written contract dated July 2, 1999 that had been approved by the Bankruptcy Court as a vehicle for reorganization ("Agreement"). Appendix "I". To achieve reorganization, the Agreement provided the method by which the Petitioners could restructure the ownership of their real estate, and refinance their indebtedness. The anticipated end-result was creation of a joint venture partnership between the Petitioners and Leucadia and joint ownership and management of the several properties through newly-formed entities defined as Ventures.

The Honorable Melanie L. Cyganowski, United States Bankruptcy Judge, Eastern District of New York, approved the Agreement. Among the Agreement's provisions was one that afforded the Petitioners the right to complete restructuring ownership of their real estate through a consensual fore-

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[1] The Petitioners are Bay Harbour Associates, L.P., Huntington Square Associates, L.P., Rochester Associates, L.P., Verleye & Jericho Associates, L.P., and Riverwood La Place Associates, L.L.C.

[2] The Respondents will be collectively referred to here as "Leucadia."

closure, by making a demand for it before December 15, 1999. The demand was timely made, but Leucadia refused to comply, arguing that the Petitioners were required to refinance the debt as a condition precedent to consensual foreclosure. Appendix "H". That pre-condition, however, is not in the Agreement. When a dispute arose as to the Agreement's interpretation, Judge Cyganowski found (a) that the Agreement was clear and unambiguous, and (b) that the Petitioners and Leucadia were required to obtain refinancing of the underlying indebtedness by a specific date - December 15, 1999. Appendix "E", "F", and "G". She held that, since refinancing had not been obtained, Leucadia was not required to proceed with a consensual foreclosure. She dismissed the Petitioners' adversary complaint after trial, resulting in liquidation - indeed forfeiture - of the Petitioners' real estate to Leucadia, valued in excess of $62 million. Her Judgment was affirmed by the Honorable Denis R. Hurley, Sr., United States District Court Judge, Eastern District of New York. Appendix "C" and "D". His Judgment was affirmed by the Second Circuit Court of Appeals. Appendix "B".

The Second Circuit's Summary Order was entered on January 23, 2003. Appendix "B". A petition for rehearing under Rule 40 of the Federal Rules of Appellate Procedure was timely made. Rehearing was denied by Order entered February 25, 2003. Appendix "A".

The Petitioners seek review of the Second Circuit's Judgment.

STATEMENT OF JURISDICTION

The United States Supreme Court has jurisdiction to consider this Petition by way of a Writ of Certiorari, and to decide the Petition under the following provisions:

- Article I, Section 8, Clause 4 of the United States Constitution, giving to Congress the power "[t]o establish . . . uniform Laws on the subject of bankruptcies throughout the United States." *Id.*
- Article III, Section 1, and Section 2, Clause 1, of the United States Constitution: "The judicial power of the United States, shall be vested in one Supreme Court and . . . shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority. . . ."*Id.*
- The United States Bankruptcy Code, enacted as Title 11 of the United States Code.
- Rule 10(a) of the Rules of the Supreme Court of the United States.
- Title 28 of the United States Code §2075.
- Title 28 of the United States Code §1257(a). *Id.*

STATEMENT OF THE CASE

This case concerns (a) the effect of an interpretation of a fully-integrated, clear and unambiguous, court-approved contract entered into among the Petitioners and Leucadia in the context of a Chapter 11 reorganization, and (b) the concomitant effect of that interpretation on the contract's and Chapter 11's purpose of rehabilitating the Petitioners. Are the decisions of the lower courts antithetical to Chapter 11's purpose of rehabilitating debtors? Did the Bankruptcy Court adopt an interpretation of the Agreement the Court itself approved to insure the Petitioners' rehabilitation, that made an unnecessary liquidation inevitable?

The interpretation advanced by the Petitioners fulfills the Agreement's fundamental purpose. That is, the ultimate creation of a joint venture through the agreed-upon restructuring and refinancing. This interpretation also fulfills the Agreement's broader purpose, and the central purpose of Chapter 11 of the Bankruptcy Code. That is, preventing the unnecessary dissolution of an otherwise viable debtor and affording the Petitioners a fresh start. The Petitioners' interpretation is supported by the Agreement's language, and settled rules of contract interpretation, and would have avoided liquidation of the Petitioners' estates. Their interpretation is in harmony with Chapter 11's purpose and policy.

On the other hand, the interpretation advanced by Leucadia and adopted by the lower courts necessarily requires (a) engrafting unbargained-for terms on the Agreement, (b) ignoring contract-interpretation rules, (c) disregarding the reason the Agreement was entered into in the first place (i.e.,

to effect a reorganization, give the Petitioners a fresh start), and (d) ultimately liquidating the Petitioners' assets by forfeiting their real estate to Leucadia.

At each level, the Petitioners urged that their interpretation was in harmony with Chapter 11's purpose, soundly based on applicable contract-interpretation rules, and consistent with the view that forfeiture is abhorrent under the Bankruptcy Code and in equity. The Petitioners urged that as between the two conflicting interpretations, only their's would give effect to Chapter 11's fundamental raison d'etre, and avoid a liquidation. None of the court's balanced these considerations in the Petitioners' favor, and none addressed them in their opinions.

We submit that the lower courts (a) ignored the Agreement's ultimate aim of affording the Petitioners the opportunity to reorganize as viable joint venture partners with Leucadia; (b) disregarded the purpose of Chapter 11 and incorrectly engrafted non-existent provisions in an otherwise fully-integrated, clear and unambiguous document; (c) created incongruous relationships among contract clauses; (d) failed to harmonize relevant contract clauses, improperly considered extrinsic evidence; (e) justified liquidation of valuable real estate where no forfeiture should have occurred; and (f) improperly gave Leucadia an unbargained-for windfall.

We submit that the lower courts not only had the obligation to adopt correctly an interpretation that made sense, but to do so in the context of the underlying Chapter 11 bankruptcy case. We respectfully request the Supreme Court to

speak - as it has in similar circumstances in the past[3] - to this issue because it has broad implications (a) on the fundamental rights of debtors in bankruptcy, (b) on how Chapter 11 of the Bankruptcy Code should be applied, and (c) on how contracts, entered into with the imprimatur of the Bankruptcy Court as blueprints for reorganization, should be interpreted.

STATEMENT OF FACTS

A. The mortgage indebtedness - The Cargill Loans

In 1996, CFSC Capital Corp. XXVII commenced a foreclosure action in the New York Supreme Court, Nassau County, to foreclose five separate mortgages on five separate parcels securing a debt to Cargill Financial Services Corp. of $58 million ("Cargill Loans"). The Cargill Loans included the five loans mentioned above, as well as a sixth indebtedness owed by Riverwood La Place Associates, L.L.C. ("Riverwood"), secured by real property in Louisiana. Riverwood was the first of the Petitioners to file a Chapter 11 bankruptcy petition in the Eastern District of New York.

B. The Agreement (July 2, 1999)

In the context of the Riverwood bankruptcy case, Wilbur F. Breslin, a principal common to all Petitioners, personally negotiated on the Petitioners' behalf to purchase the Cargill Loans for $49 million, as an initial first step in repaying the debt. Mr. Breslin advanced $1.5 million in cash as down

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[3] See, e.g., *N.L.R.B. v. Bildisco and Bildisco*, 465 U.S. 513, 104 S.Ct. 1188, 79 L.Ed.2d 482 (1984).

payment on the acquisition. Under the requirements of that agreement, the remaining Petitioners filed separate bankruptcy petitions under Chapter 11.

The Petitioners then entered into the Agreement with Leucadia. The Agreement afforded the Petitioners a fresh start by allowing them to refinance their mortgage debt through newly-formed "Ventures", while retaining a 50% equity interest in the properties; the other 50% interest being transferred to Leucadia. These goals were to be achieved through the separate "refinancing" and "restructuring" activities. It is universally acknowledged that the Petitioners and Leucadia had a mutual obligation to complete the restructuring and obtain the refinancing. The Bankruptcy Court then approved the Agreement with Leucadia as a blueprint for Chapter 11 reorganization, under which Mr. Breslin assigned his right to acquire the Cargill Loans to Leucadia. Leucadia acquired the Cargill Loans by assignment on July 8, 1999.

C. Restructuring and Refinancing are separate activities

(1) Restructuring

The method for restructuring ownership is set forth in Section 1.2(a) and (e) of the Agreement as follows:

- The Petitioners and Leucadia form one or more Ventures.[4]

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[4] Limited liability companies, or limited partnerships.

- The Petitioners convey the properties to the newly-formed Ventures.
    - The Petitioners and Leucadia each hold a 50% equity interest in each Venture, and manage the Ventures jointly.

(2) Refinancing

The method for refinancing the mortgage debt is set forth in Section 1.2(b)-(d) as follows:

- Newly-formed Ventures obtain new first-mortgage loans in the aggregate amount of $34 million, secured by new cross-collateralized first mortgages.[5]
- The proceeds of the new loans are paid to Leucadia to reduce the debt on the Cargill Loans.

(3) Relevance of December 15, 1999

The Agreement does not fix a specific "refinance date," as the lower court's incorrectly held.

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[5] As part of the refinancing, Leucadia agreed to provide the balance of $11 million by converting its residual interest in the Cargill Loans to new cross-collateralized second mortgage loans. This element of the Agreement - largely ignored by the lower courts - was rendered unnecessary when Mr. Breslin arranged for the sale of one of the properties and paid Leucadia $11.8 million from the sale proceeds, thereby partially performing the Agreement.

December 15, 1999 was merely the date the parties contemplated for completion of restructuring: "[I]mplementation of the restructuring of the ownership of the Properties as contemplated in Section 1.2 of this agreement (the 'Restructure Date'") * * * which must occur no later than December 15, 1999."

December 15 was also the date before which to request that Leucadia proceed with a Consensual Foreclosure[6] if necessary to complete *the restructuring*. That method is set forth in Section 1.4. Under Section 1.4, Leucadia agrees not to exercise any rights as creditor, or prosecute any foreclosure actions before December 15, 1999. Leucadia's rights as creditor are further limited by the following language:

> Leucadia will agree not to exercise any of the rights or remedies under the Cargill Loans, including prosecution of foreclosure actions, pending the Restructure Date, which must occur no later than December 15, 1999. If the Restructure Date has not occurred by December 15, 1999, Leucadia shall be free to exercise any rights or remedies under the Cargill Loans. *Notwithstanding the foregoing, if the [Petitioners] request that Leucadia foreclose any one or more of the Cargill Loans prior to December 15, 1999 in a Consensual Fore-*

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[6] A consensual foreclosure is one where the debtor-mortgagor consents to the foreclosure of the mortgage. See, e.g., *Banque Arabe Et International D'Investissement v. Maryland Nat'l Bank*, 819 F.Supp. 1282 (S.D.N.Y. 1993), *aff'd*, 57 F.3d 146 (2d Cir.).

> *closure in furtherance of the restructuring contemplated under this agreement, Leucadia will agree to do so and cause the properties covered by such Consensual Foreclosure to be conveyed to the appropriate Venture.*

Appendix "I", at 131a (emphasis added).

(4) "Notwithstanding the foregoing . . ." Clause

By inserting the so-called "Notwithstanding the foregoing . . ." clause, the parties expressly foresaw the possibility that restructuring - *for whatever reason* - might not be completed by December 15, 1999. The Petitioners were permitted, at any time prior to the 15th, to request that Leucadia foreclose any one or all of the Cargill Loans in a Consensual Foreclosure, to complete a foreclosure, and to cause the conveyance of the properties to the appropriate Ventures.

The question below was whether Leucadia was required to comply with a request for Consensual Foreclosure, even though New Financing was not in place, and the individual Ventures had not yet been formed. The Petitioners argue that only if New Financing was not placed could there be a Consensual Foreclosure.

(5) Timely Consensual-Foreclosure request

On December 14, 1999, Mr. Breslin requested in writing that Leucadia foreclose all the Cargill Loans by Consensual Foreclosure. Appendix "H". The Agreement required nothing more than the request. Appendix "I". The lower courts gave no effect, however, to Mr. Breslin's request thereby ef-

fectively deleting the clause and insuring liquidation of the Petitioners' assets. But neither restructuring nor refinancing was necessary before the request for Consensual Foreclosure could be made.

Under Section 1.2(b) it was *through the Ventures* that refinancing would be obtained. The "Notwithstanding the foregoing . . ." clause, therefore, contemplated that restructuring would not be completed, or that refinancing not be in place when the request was made. So long as the request was made before December 15, it was timely. Indeed, the request could have been made the moment the Agreement was signed.

Additionally, it was not necessary that Ventures be formed before the request was made. As the Bankruptcy Court pointed out, the Agreement left open the possibility of a simultaneous transaction: closing on the New Financing; execution of operating agreements; conveyance of the properties to the Ventures. Upon completion of the Consensual Foreclosure, Leucadia would simply cause the properties to be conveyed to the Venture or several Ventures, owned by the Petitioners and Leucadia.

Refinancing and Ventures formation were not, therefore, preconditions to a request for Consensual Foreclosure. Indeed, if Consensual Foreclosure was intended to further restructuring, if restructuring included Ventures formation, and if it was through the Ventures that refinancing be obtained, then refinancing cannot be a Consensual Foreclosure prerequisite.

The Petitioners commenced an adversary proceeding seeking, among other things, a judgment declaring their rights and obligations under the Agreement. The Second Circuit Court of Appeals, as did the Bankruptcy Court and District Court, held that under the Agreement "read as a whole, the [Petitioners] had no right to Consensual Foreclosure *absent new financing*, and because the deadline [December 15, 1999] passed, Leucadia was free to pursue any remedy available to it under the notes it had purchased [emphasis added]." Appendix "B". We submit this holding was a clear error both as a matter of contract interpretation, and as a matter of bankruptcy law.

I. THE LOWER COURTS SHOULD HAVE ADOPTED AN INTERPRETATION THAT WOULD HAVE FACILITATED A REORGANIZATION AND WOULD HAVE AVOIDED LIQUIDATION

The Supreme Court should hold that, in order to effectuate the fundamental purpose of Chapter 11, and debtor-saving, court-approved contracts, courts should strive to adopt an interpretation that would further reorganization and avoid liquidation or forfeiture of the debtor's assets.

"Congress made it a central purpose of the Bankruptcy Code to give debtors a fresh start in life and a clear field for future effort unburdened by the existence of all debts" *In re Bogdanovich,* 292 F.3d 104, 107 (2d Cir. 2002). *See, In re Romano*, 2003 WL 731723 (6th Cir. 2003), *In re Stoltz*, 315 F.3d 80 (2d Cir. 2002). Bankruptcy's design to aid the unfortunate debtor is, therefore, a strong policy consideration.

Stellwagon v. Clum, 245 U.S. 605, 617, 38 S.Ct. 215, 218-19, 62 L.Ed. 507 (1918), *In re Bogdanovich*, 292 F.3d 104, 107 (2d Cir. 2002). *See In re Taddeo*, 685 F.2d 24 (2d Cir. 1982), *In re Boo.com North America, Inc.*, 2000 WL 1923949 (S.D.N.Y. 2000).

Chapter 11 itself is designed for the purpose of preventing the unnecessary dissolution of an otherwise viable debtor. To adhere to this principle "[a] court should not precipitously sound the death knell for a debtor by prematurely determining . . . the debtor's prospects for economic revival." *In re Shockley Forest Industries, Inc.*, 5 B.R. 160, 163 (N.D.Ga. 1980).

The Supreme Court's decision in *NLRB v. Bildisco and Bildisco*, 465 U.S. 513, 104 S.Ct. 1188, 79 L.Ed.2d 482 (1984) (Rehnquist, J.) ("*Bildisco*"), is relevant to a resolution of the issues raised here. In *Bildisco*, the Supreme Court considered the effect of a labor union's Chapter 11 filing on a collective-bargaining agreement that was subject to the National Labor Relations Act ("NLRA"). The Supreme Court held that a debtor in possession could unilaterally reject a collective-bargaining agreement as an executory contract without court approval and not, by doing so, commit an unfair labor practice under the NLRA, provided the debtor in possession shows that the contract burdens the estate and that, after careful scrutiny, the equities balance in favor of rejection.

The Supreme Court recognized that the fundamental purpose of reorganization is to prevent a debtor from going into liquidation. In resolving the issue, the Supreme Court bal-

anced the competing interests of the NLRA and Bankruptcy Code. In doing so, the Supreme Court instructed that the Bankruptcy Court must focus on the ultimate goal of Chapter 11 to permit successful rehabilitation of debtors:

> The Bankruptcy Court is a court of equity, and in making this determination it is in a very real sense balancing the equities, as the Court of Appeals suggested. Nevertheless, the Bankruptcy Court must focus on the ultimate goal of Chapter 11 when considering these equities. The Bankruptcy Code does not authorize free-wheeling consideration of every conceivable equity, but rather only how the equities relate to the success of the reorganization.

465 U.S., at 527.

In response, Congress partially overruled *Bildisco*, by enacting Bankruptcy Code §1113 to set forth substantive and procedural requirements with which a debtor must comply to modify or reject a collective-bargaining agreement. See *In re Carey Transportation, Inc.*, 50 B.R. 203 (S.D.N.Y. 1985). "[But §1113] was not enacted to change the policy of Chapter 11, but only to guarantee that full and careful consideration would precede any rejection, a rejection that would not be a unilateral one by the debtor but by a Bankruptcy Court functioning as a court of equity." *In re Wheeling-Pittsburgh Steel Corp.*, 52 B.R. 997, 1006-7 (W.D.Pa. 1985) (congressional intent relative to §1113 has been foundationed on realization that Chapter 11's policy is to permit successful rehabilitation).

The Supreme Court in *Bildisco* expressly recognized an overriding consideration that equitable principles govern the exercise of bankruptcy jurisdiction. See also *Bank of Marin v. England*, 385 U.S. 99, 103, 87 Sup.Ct. 274, 277, 17 L.E.2d 197 (1966). As a general proposition, avoidance of forfeiture is favored as equity courts frown upon forfeitures. *220 West 42 Associates v. Ronbet Newmark Co.*, 84 Misc.2d 259, 375 N.Y.S.2d 255 (Sup.Ct. N.Y.Co. 1975), *mod. on other grounds*, 53 A.D.2d 829, 385 N.Y.S.2d 304 (1st Dept.), *aff'd*, 40 N.Y.2d 1000, 359 N.E.2d 701, 391 N.Y.S.2d 107. In general, to avoid forfeitures, contracts under which forfeitures are claimed are interpreted strictly. *Lyon v. Hersey*, 103 N.Y. 264, 270 8 N.E. 518, 520 (1886). *See J.N.A. Realty Corp. v. Cross Bay Chelsea, Inc.*, 42 N.Y.2d 392, 397-98, 366 N.E.2d 1313, 397 N.Y.S.2d 958 (1977), *Lurzer GMBH v. American Showcase, Inc.*, 75 F.Supp.2d 98, 102 (S.D.N.Y. 1998). A forfeiture will not, therefore, be declared under one interpretation if there is any other reasonable interpretation available which avoids forfeiture. *Brause v. 2968 Third Avenue, Inc.*, 41 Misc.2d 348, 352, 244 N.Y.S.2d 587, 591-91 (Civ.Ct. Bronx Co. 1963).

The Bankruptcy Code itself contains specific anti-forfeiture provisions to prohibit third parties, by means of forfeiture laws, or by means of ipso facto bankruptcy clauses in contracts from stripping bankruptcy debtors of valuable property rights. *E.I. Dupont de Nemours & Co. v. Cooper*, 173 B.R. 550, 560-61 (W.D. N.C. 1994). Although these anti-forfeiture statutes are not applicable here, they are relevant to and confirm the policy behind Chapter 11. Despite

this policy, the lower courts each interpreted the Agreement as essentially containing an ipso facto forfeiture clause.

The Bankruptcy Code also contains various exceptions to discharge. But courts have interpreted these exceptions narrowly against creditors and in favor of debtors so as to promote the policy of affording debtors the opportunity for a fresh start. *See In re Pelkowski*, 990 F.2d 737, 744-45 (3d Cir. 1993).

The Supreme Court's decision in *Bildisco* confirmed and supported Chapter 11's preference for reorganization and disdain for liquidation. The Supreme Court chose to further Chapter 11's debtor-saving purpose, even though the Court's preference appeared at variance with the NLRA. This preference should have been shown by the lower courts in the instant case. The lower courts, however, did not even engage in the analysis urged by the Supreme Court. The lower courts had a choice between reorganization and liquidation; between the Petitioners' reasonable and rational interpretation, and Leucadia's strained beyond-the-four-corners interpretation. The lower courts chose an incongruous interpretation that led to liquidation.

The construction adopted by the lower courts neither avoided forfeiture or afforded the Petitioners a fresh start, nor effectuated the purpose of Chapter 11.

A. How the Lower Courts Made Forfeiture Inevitable Even Though it Could Have Been Avoided

The Bankruptcy Court created an implicit term ("sufficiently advanced") that has no valid support and used it to declare that Mr. Breslin's actions were, in effect, too little and too late. The Bankruptcy Court stated that restructuring needed to be "sufficiently advanced" before Consensual Foreclosure could be demanded. The District Court did not sufficiently address the Bankruptcy Court's "sufficient existence" standard or adequately clarify how that court arrived at its conclusions.

No court defined key terms in the Agreement. The District Court tried to redefine "Venture" as used in Section 9 although the reason for the attempt is unclear. The District Court said that "Venture" was not used in the same sense in Section 9 as it was used elsewhere but utterly failed to distinguish the term (probably because there is no distinction).

No court harmonized all the provisions of the Agreement. The Bankruptcy Court almost completely ignored Section 9 and never discussed its effects or interactions with other clauses. The District Court discussed Section 9 tersely, did not relate it to the rest of the Agreement, and tried to redefine "Venture," thus avoiding further analysis. The Court of Appeals simply misunderstood essential terms and declared December 15, 1999 the deadline for refinancing.

Although it is a well-established principle that courts should endeavor to avoid forfeiture, none of the lower courts mentioned the principle, or made an adequate effort to avoid

forfeiture. The Bankruptcy Court in particular seemed more concerned with finding fault with virtually all of Mr. Breslin's actions and viewing all evidence in a light most favorable to Leucadia.

In summary, forfeiture was made inevitable by the lower courts' failure to define terms or to define them completely, accurately, or reasonably, and their failure to make reasonable efforts to harmonize the Agreement's provisions in a way that would avoid forfeiture.

II. THE PLAIN-MEANING RULE OF CONTRACT INTERPRETATION WAS DISREGARDED THEREBY INSURING A FORFEITURE OF VALUABLE REAL ESTATE AND DENYING THE APPELLANTS A FRESH START

A. Settled Points of Law

The applicable contract-interpretation principles are settled. The lower courts erred, however, in applying those principles and erred in interpreting the clear and unambiguous Agreement.

In New York there is "a strong commercial policy for the plain-meaning rule of contract interpretation; that which is stated clearly is to be applied clearly." *International Multifoods Corp. v. Commercial Union Insurance Co.*, 98 F.Supp.2d 498, 503 (S.D.N.Y. 2000). See *Metropolitan Life Insurance Co. v. RJR Nabisco, Inc.*, 906 F.2d 884, 889 (2d Cir. 1990), *Laba v. Carey*, 29 N.Y.2d 302, 277 N.E.2d 641, 327 N.Y.S.2d 613 (1971), *CCG Associates I v. Riverside As-*

sociates, 157 A.D.2d 435, 556 N.Y.S.2d 859 (1st Dept. 1990).

Additionally, as the Second Circuit Court of Appeals recognized, "[i]t is a cardinal principle of contract construction that a document should be read to give effect to all its provisions and to render them consistent with each other." *Id.*, *quoting*, *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 63, 115 S.Ct. 1212, 131 L.Ed.2d 76 (1995).

Furthermore, under New York law, whether a writing is ambiguous is a question of law to be resolved by the court. *W.W.W. Associates, Inc. v. Giancontieri*, 77 N.Y.2d 157, 566 N.E.2d 639, 565 N.Y.S.2d 440, 443 (1990). Once it is determined that an agreement is clear and unambiguous, and fully integrated, extrinsic and parol evidence is not admissible to create an ambiguity. *Id.* This fundamental principle is based on a policy that favors predictability in the interpretation of commercial writings. *International Multifoods Corp. v. Commercial Union Insurance Co.*, 98 F.Supp.2d 498, 503-4 (S.D.N.Y. 2000). To allow parol evidence to create ambiguity where none exists in the agreement's plain language would unnecessarily denigrate the contract and unsettle the law, threatening to compromise stability of commercial transactions. *Id.* at 504, *quoting*, *W.W.W. Associates, Inc.*, *supra*. "Having determined that the language chosen . . . is clear and unambiguous on its face, extrinsic evidence, such as the parties' subsequent course of conduct, may not properly be received in evidence." *In re Ionosphere Clubs, Inc.*, 147 B.R. 855, 863 (S.D.N.Y. 1992). Only when there is ambiguity in a contract may intent be ascertained by reference

to the parties' subsequent course of conduct. *Factors Etc., Inc. v. Creative Card Co.*, 444 F.Supp. 279, 281-82 (S.D.N.Y. 1977), *aff'd sub nom*, 579 F.2d 215 (2d Cir.).

Although the lower courts found the Agreement to be fully integrated, clear and unambiguous, their analysis of its various provisions did not give effect to its plain meaning, but distorted the Agreement, relied on parol evidence, and made the possibility of forfeiture a *feit accompli.*

B. Clear Errors Made by the Second Circuit Court of Appeals

We respectfully submit that the Court of Appeals overlooked relevant provisions of the Agreement, misunderstood the purpose of the agreement and its function, and did not adhere to settled principles of contract construction. The Court of Appeals made several *clear errors.*

The Agreement's "Notwithstanding the foregoing . . ." clause contained in Section 1.4 was not given effect. From the moment the Agreement was approved by the Bankruptcy Court, until December 15, 1999, the Petitioners had the right to demand that Leucadia proceed with a Consensual Foreclosure. The Court of Appeals, as did the other lower courts, obliterated this bargained-for right. Under their respective holdings, the Petitioners could never seek Consensual Foreclosure. Concluding that refinancing of the Cargill loans had to precede Consensual Foreclosure of the Cargill Loans created a paradox and an absurd result.

Very simply, refinancing a mortgage loan means that the existing loan is discharged and replaced by a new mortgage loan. Foreclosure is simply the process by which the holder of a mortgage lien terminates the mortgagor's equity of redemption by sale of the mortgaged property, the proceeds of which are used to satisfy the underlying debt. Only the holder of the mortgage lien has the right to foreclose. These fundamental points of law need no citation to precedent.

The Petitioners had the bargained-for right to demand that Leucadia proceed with Consensual Foreclosure to further the expected restructuring. But the Court of Appeals (as did the other lower courts) said that no demand could be made unless the existing mortgage loan was discharged and replaced by a new loan. This construction makes no sense, because had the Cargill Loans been refinanced - discharged and replaced by New Financing - Leucadia would hold no mortgage lien to foreclose. This is an obvious paradoxical result each court failed to grasp, and leads to an absurd construction: The Petitioners cannot demand that Leucadia foreclose the Cargill Loans, unless the Cargill Loans are first discharged and replaced with new third-party loans.

The Court of Appeals also inserted conflicting, unbargained-for terms to the Agreement to justify its determination and the resulting liquidation. Implicit in its holding is that December 15, 1999 is a firm deadline for obtaining New Financing. But nowhere does the Agreement so provide. By concluding that December 15, 1999 was a firm deadline, the Court of Appeals did not give effect to all the Agreement's provisions. The Court of Appeals (as did the other lower

courts) overlooked or ignored Section 9 of the Agreement, which contemplated that the Agreement live on after December 15, 1999, even if refinancing was not obtained by that date. Section 9, indeed, cannot exist *unless* there is no refinancing after December 15, 1999. The Court of Appeals' construction renders Section 9 inert, because it requires that under all circumstances New Financing must be in place by December 15, 1999.

The Second Circuit also credited Leucadia's argument that somehow Consensual Foreclosure would dilute Leucadia's interests, or would permit the Petitioners to avoid paying a part of the underlying debt. This could never happen under the Agreement. Because the parties' rights and obligations to one another were governed by the court-approved Agreement, under which they would eventually become joint venture partners in the ownership of the real estate, their efforts were to be cooperative, not antagonistic, and the Agreement expressly provided that the debt be paid. *It was never suggested otherwise.*

Finally, there was confusion about Leucadia's role in the acquisition of the Cargill Loans. Leucadia acquired the Cargill Loans under an agreement already in place as part of a pre-packaged-type bankruptcy through which the Cargill Loans would be paid and the Petitioners would retain their real estate, albeit with a new joint-venture partner. As an investor, Leucadia acquired a 50% interest in real estate worth over $60 million for the net amount of $4 million. The Court of Appeals' decision, however, was antithetical to the bargains negotiated and agreed upon. Under the Court of

Appeals' analysis, the Petitioners forfeited everything to Leucadia. This result was not bargained for, not justified, and clearly avoidable had the clear and unambiguous terms of the Agreement been given effect.

C. The Agreement Does not Have A Deadline for New Financing

The purpose for Leucadia acquiring the Cargill Loans was to allow for cooperative restructuring and refinancing (Agreement Section 1.2). The "*Restructure Date*" is defined in Section 1.3 of the Agreement (Appendix "I", at 131a), and the *restructuring* is described in Section 1.2a (Appendix "I", at 129a). The refinancing was described generally in Section 1.2b and c, but was defined and detailed in Section 2 under the heading "New Financing". The Agreement at Section 1.4 requires that *restructuring* must occur by December 15, 1999, and describes the parties rights' and responsibilities in the event restructuring did not occur by that date.

The Agreement does not set time limits on New Financing. In fact, the Interim Interest provision of the Agreement (Section 1.3) specifically provides that interest will continue to accrue until the (a) implementation of the restructuring of the properties as contemplated in Section 1.2 of the Agreement (the "Restructure Date"), and (b) the acquisition of the "New Financing" (discussed in Section 2), *for which no outside date is identified.* What's more, Paragraph 9 provides that, *in the event New Financing is not in place by December 15, 1999* and commencing approximately three years after the closing date, each party has that right, on a yearly basis,

to demand that any one or more of the properties be sold at the highest possible available and attainable price.

December 15, 1999, *only* pertains to restructuring. Once December 15 was interpreted, however, as the deadline to obtain New Financing, other provisions of the Agreement were made entirely superfluous, thereby defeating the parties' express intent.

D. New Financing Is Not a Prerequisite for Consensual Foreclosure under the Agreement

The Petitioners and Leucadia agreed to form individual Ventures "as promptly as possible" (Section 1.2a). Section 1.3 of the Agreement defines the date for implementation of restructuring as the "Restructure Date," and under Section 1.4, the Restructure Date will "occur no later than December 15, 1999."

Leucadia also agreed that, pending the Restructure Date, it would not foreclose the Cargill Loans. Stated differently, if after December 15, 1999, restructuring had not been accomplished, Leucadia had the right (but not the obligation) to foreclose the Cargill Loans. This scenario certainly presupposes the absence of New Financing.

But that being said, the now-infamous "Notwithstanding the foregoing . . ." clause, states: "Notwithstanding the foregoing, if the [Petitioners] request that Leucadia foreclose any one or more of the Cargill Loans prior to December 15, 1999 in a Consensual Foreclosure in furtherance of the restructuring contemplated under this Agreement, Leucadia will agree

to do so and cause the properties covered by such Consensual Foreclosure to be conveyed to the appropriate Venture." The term "notwithstanding" means "without prevention or obstruction from or by; in spite of." *Premier Car Rental, Inc. v. Governmental Employees Ins. Co.*, 223 A.D.2d 629, 637 N.Y.S.2d 177 (2d Dept. 1996) (citations omitted).

This clause reflects that certain choices had to be made by December 15, 1999. If Consensual Foreclosure was requested, Leucadia no longer had the unrestricted option to foreclose, but the obligation to do so in furtherance of restructuring. Refinancing was still required, but it was simply not a component of Section 1.4.

By exercising its right to a Consensual Foreclosure under this clause, the Petitioners kept the Agreement alive even though restructuring had not been completed, and New Financing was not in place. Leucadia had to pursue consensual foreclosure, thereby cutting off the rights of property owners, mortgagors and subordinate lienors, and cause the conveyance of the foreclosed properties to the appropriate Ventures free and clear of other claims, and in furtherance of restructuring, thereby achieving the purpose of the Agreement to jointly own the properties as members of newly-created Ventures.

The Court of Appeal's apparent confusion is evident from its Summary Order: "Because of the failure to obtain refinancing and restructure, under the terms of the Agreement, no joint venture or special relationship between the parties came into existence." Appendix "B". Whether a joint venture or special relationship *between the Petitioners and Leu-*

cadia came into existence at that time is not relevant. The Agreement had meaning and the parties had rights and obligations to one another even though a joint venture between them had not yet come into existence. To hold as the Court of Appeals did, suggests the Agreement itself could not exist unless the joint venture had come into existence. This was certainly not the parties' intended result.

The lower courts tried to find the meaning of the Agreement. But they found a meaning that was antithetical to Chapter 11's purpose and resulted in liquidation. This result wasn't necessary, proper or inevitable. The Agreement's terms can and should be harmonized to produce an interpretation that is reasonable, supported by the Agreement's language, avoids liquidation and forfeiture, and fulfills the Bankruptcy Code's purpose.

CONCLUSION

We ask the Supreme Court to review the Agreement as a whole, to announce a strong preference under Chapter 11 for adopting an interpretation that would avoid liquidation, and to interpret the Agreement in light of Chapter 11's purpose. Justice, the Bankruptcy Code, and stability of commercial obligations under Chapter 11's umbrella demand that courts explore every reasonable means to interpret debtors' court-approved contracts, in general, and this Agreement in particular, in a way that avoids liquidation, forfeiture and injustice, promotes the promise of a fresh start, and effectuates the purpose of the Bankruptcy Code.

The Bankruptcy Court first approved the Agreement in order to promote the Petitioners' reorganization and to avoid liquidation. But when asked to interpret its clear and unambiguous terms, it adopted an interpretation that insured liquidation. The District Court and Court of Appeals agreed. Each court, however, missed the point of the Agreement, the reason it was entered into, the reason the petitioners sought Chapter 11 protection in the first place, and the purpose and aim of bankruptcy reorganization. Refinancing was not a Consensual Foreclosure prerequisite under the Agreement. Leucadia should have honored Mr. Breslin's timely demand.

Courts often pay lip service to the ancient maxim, "equity abhors forfeiture." By adopting a construction that was consistent with the Agreement's terms, the lower courts would have avoided a forfeiture and would have fulfilled the Agreement's and Chapter 11's purpose. We respectfully submit that the lower courts overlooked this maxim even though it clearly applies to this case, thereby rendering the maxim obsolete as well as ancient.

The Petitioners respectfully request that this Petition be granted.

Dated: Carle Place, New York
May 21, 2003

Respectfully submitted,

MATTHEW DOLLINGER, ESQ.
Counsel of Record
Michael J. Spithogiannis, Esq.
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APPENDIX A - ORDER DENYING PETITION FOR REHEARING, FILED FEBRUARY 25, 2003

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
40 Foley Square
New York, NY 10007

As a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 25th day of February, Two Thousand Three

Present:

Hon. Fred I. Parker,
Hon. Chester J. Straub,
Hon. Robert D. Sack,

Circuit Judges.

In re:

BAY HARBOUR ASSOCIATES, L.P.,
BUSY BEE ASSOCIATES, L.P.,
HUNTINGTON SQUARE ASSOCIATES, L.P.,
ROCHESTER ASSOCIATES, L.P.,
DOYLE REALTY, L.L.C.,
VERLEYE & JERICHO ASSOCIATES, L.P.
Debtors.

BAY HARBOUR ASSOCIATES, L.P., HUNTINGTON SQUARE
ASSOCIATES, L.P., ROCHESTER ASSOCIATES, L.P.,
VERLEYE & JERICHO ASSOCIATES, L.P. & RIVER-
WOOD

LA PLACE ASSOCIATES, L.P.,
Debtors-Appellants,

v.

LEUCADIA NATIONAL CORPORATION, LEUCADIA, INC., & LUK-SHOP LLC,
Appellees.

A petition for panel rehearing having been filed herein by Appellants Bay Harbour, L.P., Huntington Square Associates, L.P., Rochester Associates, L.P., Verleye & Jericho Associates, L.P. and Riverwood La Place Associates, L.L.C.,

Upon consideration thereof; it is Ordered that said petition be and it hereby is DENIED.

FOR THE COURT

ROSEANN B. MACKECHNIE, Clerk

By:_____

Arthur M. Heller,
Administrative Attorney Mathew
Dollinger, Esq. Dollinger, Gonski &
Grossman I Old Country Rd.
Carle Place, NY 11514

APPENDIX B – SUMMARY ORDER OF THE SECOND CIRCUIT COURT OF APPEALS, DATED FEBRUARY 23, 2003

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSE OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 23rd day of January, Two Thousand and Three.

PRESENT: HONORABLE FRED I. PARKER
HONORABLE CHESTER J. STRAUB,
HONORABLE ROBERT D. SACK,
Circuit Judges.

In Re:
BAY HARBOUR ASSOCIATES, L.P.,
BUSY BEE ASSOCIATES, L.P.,
HUNTINGTON SQUARE ASSOCIATES, L.P.,
ROCHESTER ASSOCIATES, L.P.,
DOYLE REALTY, L.L.C.,
VERLEYE & JERICHO ASSOCIATES, L.P.,
Debtors.

BAY HARBOUR ASSOCIATES, L.P., HUNTINGTON SQUARE ASSOCIATES, L.P., ROCHESTER ASSOCIATES, L.P., & VERLEYE & JERICHO ASSOCIATES, L.P.,
Debtors-Appellants,
v.

LUK-SHOP LLC, No. 02-5025
Appellee.

APPEARING FOR APPELLANTS:
Michael Brofman, Esq.
Braverman Warfield, LLP
New Hyde Park, NY

APPEARING FOR APPELLEE:
Martin J. Bienenstock, Esq.
Weil,Gotshal & Manges, LLP,
New York, NY

Appeal from the United States District Court for the Eastern District of New York (Denis R. Hurley, *Judge*.)

In Re:
BAY HARBOUR ASSOCIATES, L.P., BUSY BEE ASSOCIATES, L.P., HUNTINGTON SQUARE ASSOCIATES, L.P.
ROCHESTER ASSOCIATES, L.P.,
DOYLE REALTY, L.L.C.,
VERLEYE & JERICHO ASSOCIATES, L.P.,
Debtors.

BAY HARBOUR ASSOCIATES, L.P., HUNTINGTON SQUARE ASSOCIATES, L.P., ROCHESTER ASSOCIATES, L.P., & VERLEYE & JERICHO ASSOCIATES, L.P. & RIVERWOOD LA PLACE ASSOCIATES, L.P.
Debtors-Appellants,

No. 02-5027

v.

LEUCADIA NATIONAL CORPORATION, LEUCADIA, INC., and LUK-SHOP LLC,
Appellees.

APPEARING FOR APPELLANTS:
Matthew Dollinger, Esq.,
Braveman Warfield LLP
New Hyde Park, NY

APPEARING FOR APPELLEES:
Gerald Stein, Esq.
Weil, Gotshal & Manges, LLP,
New York, NY

Appeal from the United States District Court for the Eastern District of New York (Denis R. Hurley, *Judge*.)

In Re:
BAY HARBOUR ASSOCIATES, L.P.,
BUSY BEE ASSOCIATES, L.P.,
HUNTINGTON SQUARE ASSOCIATES, L.P.,
ROCHESTER ASSOCIATES, L.P.,
DOYLE REALTY, L.L.C.,
VERLEYE & JERICHO ASSOCIATES, L.P.,

Debtors.

RONALD PECUNIES, JACK EASA, and EASA EASA,
Appellants,

v.

No. 02-5033

LEUCADIA NATIONAL CORPORATION, LEUCADIA, INC., and LUK-SHOP LLC,
Appellees.

APPEARING FOR APPELLANTS:
Eric Snyder, Esq.,
Pryor & Mandelup, LLP
Westbury, NY

APPEARING FOR APPELLEES:
Martin J. Bienenstock, Esq.
Weil, Gothshal & Manges, LLP,
New York, NY

Appeal from the United States District Court for the Eastern District of New York (Denis R. Hurley, *Judge*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the judgments of said district court be and they hereby are AFFIRMED.

In three related cases, 02-5025, 02-5027, and 02-5033, debtors-appellants Bay Harbour Associates, Inc., Huntington Square Associates, L.P., Rochester Associates, L.P., and Verleye & Jericho Associates, L.P., (collectively "the Debtors"), and certain of their equity holders, appeal the March

22 and 26, 2002 judgments and orders of the U.S. District Court for the Eastern District of new York (Denis R. Hurley, Judge), affirming the judgments and orders of the Bankruptcy Court (Melanie L. Cyganowski, Bankruptcy Judge) regarding an expensive contract and foreclosure dispute in the midst of the Debtors' Chapter 11 proceedings.

This court reviews the district court's action de novo. Giving the same deference to the bankruptcy court decision as the district court owed. "Because the district court acted as an appellate court in a bankruptcy case, its decision is subject to plenary review." *Schneiderman v. Bogdanovich (In re Bogdanovich),* 292 f.3d 104, 109 (2d Cir4. 2002). As a result, [w]e accept [the bankruptcy court's] factual findings unless clearly erroneous, but review [the court's] conclusions of law de novo." *Bell v. Bell* (In re Bell), 225 F.3d 203, 209 (2d Cir. 2000).

At their core, 02-5025 and 02-5027 involve a contact interpretation dispute which we believe the district court resolved correctly in favor of appellee Leucadia and its affiliate Luk-Shop in both cases. As Debtors were about to default on a cross-collateralized debt to another creditor of approximately $92 million, Leucadia purchased the notes and entered the contractual agreement with Debtors which is now at issue. The parties agreed that the debt would be refinanced and Luk-Shop would receive approximately $45 million from that refinancing; and also that the Debtors' Assets would transferred into a joint venture held equally between Debtors and Luk-Shop. If this restructuring did not occur by December 15, 1999, the agreement further provided that

Leucadia could exercise any rights and remedies to recover on the debt.

When the refinancing and lump sum payment did not take place, case 02-5027 ensued and Leucadia asserted a right to the properties in their entirety, while Debtors argued that Leucadia was bound by the agreement to consensually foreclose on the debtors' assets and convey them to the joint venture. Each party cited separate sections of the agreement in support of its claims.

It is a "cardinal principle of contract construction that a document should be read to give effect to all its provisions and to render them consistent with each other. " *Mastrobuono v. Shearson Lebman Hutton, Inc.*, 514 U.S. 52, 63 (1995). "All provisions of a contract be read together as a harmonious whole, if possible." *Kinek v. Paramount Communications, Inc.*, 22 F.3d 503, 509 (2d Cir. 1994). The district court agreed with Leucadia and Luk-Shop that under the agreement, read as a whole, the Debtors had no right to consensual foreclosure absent new financing, and because the deadline had passed, Leucadia was free to pursue any remedy available to it under the notes it had purchased. We agree.

Because of the failure to obtain refinancing and restructure, under the terms of the agreement, no joint venture or special relationship between the parties came into existence. In case 02-5025, we agree with the bankruptcy court's view that the equity holders and insider creditors had no rights to a fund unconditionally set aside for outsider creditors like Leucadia. With respect to the remainder of the Debtors' ob-

ligation to Leucadia, secured by all of Debtors' assets, substantially exceeded the value of the assets. Under the plan confirmed by the bankruptcy court and subsequently consummated, Leucadia took title to those assets; nothing remains. Therefore, a remand of this case for further litigation, given that it seems clear the Debtors can receive no further relief, would be inappropriate. *Cf. In re: Chateauguay*, 10 F.3d 944, 949-50 (2d Cir. 1993) (concluding that when a plan of reorganization has been substantially consummated, an appeal from confirmation is moot if it would be inequitable to grant the relief requested). [1]

The final case, 02-5033, is brought by equity holders of the Debtors, claiming that Leucadia is receiving excessive compensation for its claim under the plans. In view of the lack of any objection to the property values adopted by the bankruptcy court, there is no basis to conclude that the court's decision to forgo a valuation hearing and use figures which had been agreed upon by all parties constituted error, or that the appellants are being treated unfairly and in violation of 11 U.S.C. § 1124.

We therefore affirm for substantially the same reasons as were set forth by the district court in all three cases.

The judgments of the district court are AFFIRMED.

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[1] Debtors counsel conceded at argument that the Debtors' non-recourse loan arguments were not raised below to either the bankruptcy court or the district court. Accordingly, these arguments are waived and will not be considered on appeal. *See In re Blackwood Associates, L.P.*, 153 F.3d 61, 67 (2d Cir. 1998).

FOR THE COURT,
Roseann B. MacKechnie, Clerk

By:_____
Lucille Carr, Operations Manager

APPENDIX C – JUDGMENT OF JUDGE HURLEY, DATED MARCH 22, 2002

United STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

In re
Bay Harbour Associated, L.P., Busy Bee Associates, L.P., Huntington Square Associates, L.P., Rochester Associates, L.P., Verleye & Jericho Associates, L.P., Doyle Realty, LLC, et al.,

JUDGEMENT

CV00-4606 (DRH)

Debtors.

Bay Harbour Associated, L.P., Huntington Square Associates, L.P., Rochester Associates, L.P., Verleye & Jericho Associates, L.P., and Riverwood La Place Associates, L.L.C.,

Plaintiffs-Appellants,

-against-

Leucadia National Corporation, Leucadia Inc. and Luk-Shop LLC,

Defendants-Appellees,

An Order of Hon. Denis R. Hurley, United States District Judge, having been filed on March 22, 2002, affirming the judgment of the Bankruptcy Court it is

ORDERED AND ADJUDGED that the judgment of the Bankruptcy Court is hereby affirmed.

Dated: Central Islip, New York
March 22, 2003

ROBERT C. HEINEMANN
Clerk of the Court

By: _____

APPENDIX D – DECISION OF JUDGE DENNIS R. HURLEY, DATED MARCH 20, 2002

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

District Court Docket
No.:00-CV-4606 (DRH)

In re:	Chapter 11
BAY HARBOUR ASSOCIATED, L.P.,	Case No.: 899-85379-511
Debtor,	Chapter 11
BUSY BEE ASSOCIATES, L.P.,	Case No.: 899-85378-511
Debtor,	Chapter 11
HUNTINGTON SQUARE ASSO, L.P.,	Case No.: 899-85377-511
Debtor	Chapter 11
ROCHESTER ASSOCIATES, L.P.,	Case No.: 899-85376-511
Debtor,	Chapter 11
VERLEYE & JERICHO ASSOC, L.P.,	Case No.: 899-85375-511
Debtor,	Chapter 11
DOYLE REALTY, L.L.C.,	Case No.: 899-85374-511
Debtor,	

In re:	
RIVERWOOD LA PLACE ASSOC, L.L.C.,	Case No.: 897-89417-511
Debtor.	

BAY HARBOUR ASSOCIATES, L.P.,	
HUNTINGTON SQUARE ASSOCIATES, L.P.,	
ROCHESTER ASSOCIATES, L.P.,	Adv. Pro. No. 800-8130-511
VERLEYE & JERICHO ASSOCIATES, L.P.	
And RIVERWOOD LA PLACE ASSOCIATES, L.L.C.,	
Plaintiffs-Appellants,	
-against-	

LEUCADIA NATIONAL CORPORATION, LEUCADIA, INC. and LUK-SHOP LLC,

Defendants-Appellees,

APPEARANCES:
Attorneys for Plaintiffs-Appellants:
Dollinger, Gonski, Grossman, *et al.*
One Old Country Road
Carle Place, New York 11514
By: Matthew Dollinger, Esq.

Shaw, Licitra, Bohner, Esernio & Schwartz, P.C.
101 Franklin Avenue
Garden City, New York 11530
By: Jay Stanley Shaw, Esq.

Attorneys for Defendants and Appellees:
Weil, Gotshal & Manges
767 Fifth Avenue
New York, New York 10022
By: Martin J. Bienenstock, Esq.

Hurley, District Judge

Bay Harbour Associates, L.P., Huntington Square Associates, L.P., Rochester Associates, L.P., Verleye & Jericho Associates, L.P., and Riverwood La Place Associates, L.L.C., ("appellants" or "Breslin Entities")[1] appeal from the Judgment of the Honorable Melanie L. Cyganowski, Bankruptcy

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[1] Wilbur F. Breslin is a major principal of each of the appellant entities.

Judge, dated August 4, 2000, which, after a four day trial, dismissed each of the appellants' five causes of action against Leucadia National Corporation, Leucadia, Inc. and Luk-Shop, L.L.C., ("appellees" or "Leucadia") and granted judgment to appellees on their counterclaim.

BACKGROUND

The first sixteen pages of Judge Cyganowski's opinion, familiarity with which is assumed, present the relevant facts in this case. Nonetheless, a brief synopsis of those facts is necessary to place the following discussion in context.

In early 1999, the Breslin Entities, along with Busy Bee Associates, L.P. – another entity in which Wilbur F. Breslin was a principal – were delinquent in repaying approximately $90,000,000 owed to CFSC Corporation XXVII ("Cargill"). Wilbur F. Breslin ("Breslin"), on behalf of the mortgagors, entered into an agreement in February of 1999 with Cargill under which the Breslin Entities could purchase the Cargill loans for $49,000,000 if the sum were paid to Cargill by July 16, 1999. The agreement further provided that if the payment were not made by July 16th, then the Breslin Entities would deliver deeds to all of the properties that secured the Cargill indebtedness to the mortgagee.

As the July 16, 1999 deadline approached and the Cargill indebtedness remained outstanding, the Breslin Entities entered into negotiations with Leucadia. Those negotiations culminated with the signing of an agreement dated July 2, 1999, which agreement is the subject of the present appeal.

1. Terms of Agreement

The relevant provisions of the July 2nd agreement read as follows:

> Leucadia, Inc. or one of its affiliates or designees (Leucadia) is pleased to advise you that Leucadia agrees, subject to all of the terms and conditions set forth in this letter, to (a) taking an assignment of your rights to acquire and acquiring the outstanding mortgage financing with respect to the addressees and the properties securing the outstanding financing from the Cargill Entities and (b) restructuring the ownership and financing arrangements with respect to each of the properties (the "Properties) securing the Cargill Loans (as hereinafter defined) and the debt, as follows:

1. Loans

1.1 Acquisitions. The existing first mortgage financing outstanding and owed by the Breslin entities named as addresses above (the "Breslin Entities") to the Cargill Entities (the Cargill Loans') will be purchased by Leucadia from the Cargill Entities for $49 Million....

1.2 Purpose. The purpose of Leucadia's acquisition of the Cargill Loans is to allow for a restructuring and refinancing of the Properties with the Breslin Entities as follows:

a. The Breslin Entities will enter into new limited partnership or limited liability company arrangements (the "Venture(s)") with Leu-

cadia such that the Breslin Entities would contribute 100% of their interests in the Properties (and the partnerships that own the Properties)... to the Venture (s) in exchange for fifty percent (50%) of the equity interest in the Venture (s) and Leucadia will own fifty percent (50%) of the equity interest in the Ventures (50%). The parties will proceed to establish the Venturers and make such contributions as promptly as possible. The material terms and conditions of the Ventures will be consistent with the terms and conditions of this agreement.

b. Leucadia and the Breslin Entities will obtain through the Venture (s) new cross collateralized first mortgage loans (the "First Loan") with respect to certain of the Properties in the approximate aggregate of $34 Million.

c. Leucadia will convert its interest in the Cargill Loans to new cross collateralized second mortgage loans (the "Second Loans") with respect to the Properties in the approximate aggregate amount of $11 Million (with the understanding that the Second Loans will be in a first position on the Properties not included in the first Loan).

d. The difference of $4 Million between (i) the aggregate total of the First Loan and Second Loans and (ii) the amount of Leucadia's purchase price of $49 Million shall be Leu-

cadia's equity contribution for fifty percent (50%) of the Venture (s).

e. The equity in the Venture (s) will then be owned fifty percent (50%) by Breslin and the Breslin Entities (including any existing unrelated partners that Breslin may have in any or all of the Breslin Entities) and fifty percent (50%) by Leucadia. Governance of the Venture (s) shall be divided equally in a fifty-fifty manner between the Breslin Entities and Leucadia, by two co-managing members, one designated by Breslin and one designated by Leucadia.

. . . .

1.3 [**Section 1.3** defines the term "Restructure Date" as: implementation of the restructuring of the ownership of the Properties as contemplated in Section 1.2 of this agreement."]

1.4 Forebearance. Leucadia will agree not to exercise any of the rights or remedies under the Cargill Loans, including prosecution of foreclosure actions, pending the Restructure Date, which must occur no later than December 15, 1999. If the Restructure Date has not occurred by December 15, 1999, Leucadia shall be free to exercise any rights or remedies under the Cargill Loans. The Breslin Entities acknowledge that after the Closing Date no rights exist to acquire the Cargill Loans for any amount less than the accrued and unpaid debt under the Cargill Loans. From the Closing Date and until the Restructure Date, the Properties will be

managed in the manner contemplated in Section 5 of this agreement. Notwithstanding the foregoing, if the Breslin Entities request that Leucadia foreclose any one or more of the Cargill Loans prior to December 15, 1999 in a consensual foreclosure in furtherance of the restructuring contemplated under this agreement, Leucadia will agree to do so and cause the properties covered by such consensual foreclosure to be conveyed to the appropriate Venture.

2. New Financing.

2.1 First Mortgage Loan. The new First Loan shall be a commercially reasonable, market rate first mortgage loan secured by liens, upon certain of the Properties (the Properties owned by Busy Bee Associates, L.P. and Verleye & Jericho Associates, L.P. shall not be encumbered by the First Loans) and cross-collateralized as to the entire cumulative total outstanding from the time to time, anticipated to be approximately $34 million. Leucadia acknowledges that the Properties owned by Busy Bee Associates are subject to a contract for sale, but Leucadia has not consented to, and is not obligated to consent to, such contract. Scheduled payments as they become due shall be primary to all payments with respect to the Second Loans and to any payments wit respect to management of or for the benefit of the equity in the Venture (s).

2.2 Leucadia Second Mortgage Loan. The Second Loans will constitute second-in-priority mortgage liens against each of the Properties, subject only to the First Loan, cross collateralized with respect to the total aggregate amount outstanding, anticipated to be approximately $11 million.

. . . .

9. Rights of Sale. Commencing upon the first day of the thirty-seventh (37th) month after the Closing Date hereunder, and continuing annually thereafter, either party shall have the right to demand that any one or more of the Properties be sold at the highest possible available and attainable price. Each party shall also have such right in the event the New Financing is not in place on the Properties by December 15, 1999. In the event of any such sale, either party shall have the right to bid for and acquire the Properties from the Venture (s) upon market terms and conditions.

. . . .

12. Closing Date. The parties agree that the date of closing of the acquisition of the Cargill Loans shall be no later than July 9, 1999 (the "Closing Date"). Closing shall take place in the City of New York, New York at the offices of Leucadia or such other place as Leucadia deems reasonably necessary and appropriate. All costs of closing shall be borne by the Ventures, except that each party shall pay the fees and expenses of its own attorneys. In connection with the closing, the parties agree to cooperate with each other so as to minimize the tax conse-

quences of the contemplated transaction, as long as the same will not jeopardize such transaction. In addition, after closing the Ventures shall pay a fee in the aggregate amount of $500, 000 to Glenn Myles for brokerage and finders services.

13. Entire Agreement. This agreement represents the entire agreement between the parties hereto with respect to the subject matter hereof and supersedes all prior oral and written agreements and commitments. This agreement is not a joint venture agreement and no joint venture, partnership or similar relationships shall exist between Leucadia and the Breslin Entities until the Ventures are formed, the Properties are contributed to the Ventures, and the indebtedness under the Cargill personal to the addresses [and is] intended solely for your benefit and not for the benefit of any third party. This agreement is not assignable by you. Time is of the essence of this agreement. The rights and obligations of the parties hereunder are subject to approval by the United States Bankruptcy Court for the Eastern District of New York, which currently has jurisdiction over the Breslin Entities and the Properties. [2] The Breslin Entities agree to deal solely with Leucadia in connection with

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[2] On July 7, 1999, the Bankruptcy Court entered an Order approving the July 2, 1999 agreement.

the transactions contemplated under this agreement.

2. Restructuring as Required by Section 1.2 of the Agreement did not Occur by December 15, 1999

Although the agreement calls for restructuring under section 1.2 (a) "as promptly as possible" such restructuring had not occurred by December 15, 1999 as required under section 1.4. However, on December 14, 1999, Breslin sent the following letter to Leucadia:

> Pursuant to Section 1.4 of the above-referenced Agreement, we hereby request that Leucadia foreclose the Cargill loans (as defined in the Agreement) in a consensual foreclosure in furtherance of the restructuring contemplated under the Agreement, and thereby cause the properties covered by such foreclosure to be conveyed to the appropriate venture (as defined in the Agreement)

(Pls.' Ex. 2.)

Leucadia responded to the Breslin letter in pertinent part:

> As you know, that provision was inserted at your specific request in order to assist you in the event one or more of your existing partners refused to cooperate with the restructuring. To utilize this provision in an attempt to circumvent that other specific requirements of the letter agreement is certainly contrary to the spirit in which we entered into that agreement.
>
> However, more importantly, your request is, under the circumstances, contrary to the terms of the agreement. Any such consensual foreclosure must

be " in furtherance of the restructuring contemplated" under the agreement. The restructuring is outlined in paragraphs (a) through (e) of Section 1.2 of the agreement. The new first mortgage (item (b) of Section 1.2) is not in place (and will not be in place by the agreed-upon deadline of December 15th).

Since it is clear that no funds will be available on December 15th, a consensual foreclosure will not be in furtherance of the restructuring and therefore you are not entitled to the actions you request under that terms of the agreement.

(Pls.' Ex. 3.)

Breslin Entities Sue for, Inter Alia, and Order Directing Leucadia to Consensually Foreclose on the Properties Securing the Cargill Loan and to Convey *the Properties to the Appropriate Venture.*

Following Leucadia's refusal to commence a voluntary foreclosure, the Breslin entities served a complaint alleging five causes of action. The first cause of action seeks a declaration that the July 2nd agreement did not require the plaintiffs to obtain financing for the joint ventures by December 15, 1999. The second cause of action seeks both compensatory and punitive damages for the purported breach of a fiduciary duty owed by defendants to plaintiffs. The third cause of action seeks compensatory damages for breach of the July 2nd agreement, while the fourth seeks a judgment directing defendants to "apply for and obtain the Refinance Mortgage Loans for the properties." Finally, the

> fifth cause of action seeks a judgment directing defendants to specifically perform their obligation under section 1.4 of the July 2nd agreement and foreclose on the properties in a consensual foreclosure "and, thereafter, convey the Properties to Ventures owned by Plaintiffs and Leucadia."

In their answer, defendants deny the material allegations of the complaint and assert, inter alia, a counterclaim. The thrust of the counterclaim is that the July 2nd agreement expressly provides in section 13 that no joint venture will come about until the ventures are formed, the properties are contributed to the ventures and the indebtedness under the Cargill Loans have bee restructured, none of which occurred by the December 15, 1999 date.

4. July 13, 2000 In Limine Ruling by Judge Cyganowski

The Breslin Entities made an in limine motion shortly before trial, arguing that (1) the July 2nd agreement is clear and unambiguous, (2) the Breslin Entities had the right to demand consensual foreclosure under the last sentence of section 1.4, (3) that such a demand was made and improperly rejected by Leucadia, and (4) the Court, therefore, should direct Leucadia to consensually foreclose the subject properties and to convey them to the appropriate venture or ventures, thus obviating the need for a trial.

Judge Cyganowski agreed that the agreement is clear and unambiguous, thereby "require[ing] the exclusion of conversations, negotiations, or agreements made prior to or con-

temporaneous with [the] written agreement" which would tend to vary or contradict its meaning. (Tr. 7/13/00 Proceeding at 38; *see also id.* at 39; see generally 58 N.Y. Jur. 2d § 564.) However, she declined to adopt the interpretation urged by the Breslin Entities, explaining that the last sentence of ¶ 1.4 must be read together with the other relevant provisions in the contract. (Tr. 7/13/00 Proceeding at 40-41.)

5. July 2000 Trial

The trial was conducted before Judge Cyganowski on July 18, 19 and 21, 2000. Numerous witnesses were called and exhibits received into evidence. Given the Court's in limine ruling as to the applicability of the parol evidence rule, the trial evidence was largely confined to two areas: (1) the post-contract conduct of the parties vis-a vis the performance of their respective obligations and (2) a serried of admission made by Wilbur F. Breslin and other representatives of the Breslin Entities which called into question the legitimacy of their position that Leucadia was in breach of its obligations under the July 2nd agreement.

Judge Cyganowski found that the Breslin Entities failed to prove the allegations embraced within each of its five causes of action. (Decision After Trial of 8/4/00, at 65-67.) In doing so, she relied on the agreement as written, as well as evidence pertaining to the actions of the parties following its execution including the previously noted admissions. (*id.* at 26 ("In addition to the terms of the July 2nd Agreement, the Court finds that the parties, including the Plaintiffs, understood that the December 15, 1999 date was a deadline by

which new financing had to be obtained and that their actions were consistent with that understanding.").)

Judge Cyganowski also found that Leucadia was entitled to judgment on its counterclaim since "[p]laintiffs failed to comply with the express conditions of the July 2nd Agreement, " and, accordingly, "[d]efendants are entitled to enforce all the rights and remedies available to them as the holder of the Cargill loans." (*id.* at 67.)

6. Scope of Appeal

Although Judge Cyganowski dismissed all of plaintiffs' causes of action, appellants seek a reversal only as to " the First and Fifth Counts, and as to the counterclaim." (Appellants' Br. at 2.) Therefore, as noted by the appellees, Appellants have abandoned their appeal as to the Second, Third and Fourth Counts of the their Complaint." (Appellees' Br. at 5.) *See LoSaco v. City of Middletown*, 71 F.3d 88, 92 (2d cir.1995) (failure to raise an issue in an appellate brief results in an abandonment of that issue).

What remains primarily is "whether Leucadia had the right to reject Breslin's demand for consensual foreclosure. (Appellants' Br. at 10.)

7. Position of Parties

Appellants' arguments largely mirror the previously outlined arguments presented to Judge Cyganowski during the July 13th in limine motion proceeding. Additionally, they label the receipt into evidence of the parties' post-July 2nd conduct, and of the admissions of appellants, as

error given the complete and unambiguous character of the agreement.

Appellees also maintain that the July 2nd agreement is clear and unambiguous, and urge (1) that the restructuring and refinancing provisions may not be read in isolation but rather must be read within the context of the agreement as a whole and (2) that Judge Cyganowski, so reading the contract, properly concluded that Leucadia is entitled to enforce all the rights and remedies available to them as the holder of the Cargill loans in view of the fact that no third-party financing had been arranged nor had any ventures been created by the December 15, 1999 deadline.

8. Standard of Review

A district court reviews a bankruptcy court's "conclusions of law de novo, and findings of fact under a clearly erroneous standard." *In re Ionosphere Clubs, Inc.*, 922 F.2d 984, 988-89 (2d Cir. 1990).

DISCUSSION

1. Parties' Post-Contract Conduct and Appellants' Admission Were Properly Received in Evidence

Judge Cyganowski accurately explained the parol evidence rule. (*See* discussion *supra* part 4.) The rule, by its very nature, does not limit the admissibility of relevant evidence concerning the parties' performance or nonperformance of their respective contractual obligations. Similarly, the rule is inapplicable to the post-contract admissions unless such admissions are utilized to vary or contradict the terms of an unambiguous integrated contract.

In her August 4, 2000 decision, Judge Cyganowski details a series of admissions made by Breslin and other individuals acting on behalf of the Breslin Entities in this and related proceedings. (Decision after Trial of 8/4/00, at 26-31, 48.) Some of the admissions are in letter form, while others are in documents filed, and oral representations made in the bankruptcy court.
(*id.*)

Appellants' admission were not needed to interpret the July 2, 1999 agreement but were germane to the allegations in the complaint charging Leucadia with failing to perform their contractual obligations. For that reason, the admissions, and the parties' post-contract conduct, were appropriately received in evidence.

2. July 2nd Agreement is Unambiguous and December 15th was the Deadline for Restructuring

As noted, both appellant and appellee recognize that the July 2nd agreement is a complete and unambiguous recitation of the contract between the Breslin Entities and Leucadia, although each urges a different interpretation. But a contract is not ambiguous simply because the parties articulate different interpretations. *Bethlehem Steel Co. v. Turner Constr. Co.*, 2 N.Y. 2d 456, 460, 141 N.E.2d 590, 593 (1957); *Seiden Assocs., Inc. v. ANC Holdings, Inc.*, 958 F.2d 425, 428 (2d Cir. 1992).

Central to appellants' argument is the proposition that "restructuring and a refinancing ... are two separate concepts, part of an intertwined transaction, but nevertheless two separate contracts [(sic); presumably transcript should read

concepts" (Tr. 7/13/00 Proceeding at 32.) However, in determining the meaning of the contract, "fundamental contract law requires the parties' intent to be discerned by reading the contract law as a whole, and by considering all its clauses together to determine if and to what extent one may modify, explain or limit another." *Allendale Mut. Ins. Co. v. Excess Ins. Co.*, 992 F. Supp. 271, 274 (S.D.N.Y. 1997); *accord Norfolk S. Rwy. Co. v. Flexi-Van Leasing Inc.*, No. 99 Civ. 0055, 2000 WL 1855112, at *6 (S.D.N.Y. Dec. 18, 2000).

Judge Cyganowski determined the meaning of the July 2nd agreement consistent with the above principles, correctly concluding that restructuring and refinancing are not "separate concepts." Indeed, section 1.2 identifies the "purpose of Leucadia's acquisition of the Cargill Loans and Leucadia's is to allow for a restructuring and refinancing of the properties." Pivotal to the arrangement was the infusion of $34,000,000 from a third-party lender. Section 1.4 provided that "[I]f the Restructure Date has not occurred by December 15, 1999, Leucadia shall be free to exercise any rights or remedies under Cargill Loans."

The Restructure Date" is defined in section 1.3 as the "implementation of the restructuring of the ownership of the properties as contemplated in section 1.2 of this agreement." Section 1.2(a), in turn, calls for the Breslin Entities to "enter into new limited partnerships or limited liability company arrangements, (the 'Venture (s)') with Leucadia." This was to be accomplished "as promptly as possible," by the Breslin Entities contributing 100% in exchange for a 50% equity interest in the ventures, with the remaining 50% to be owned by Leucadia. Section 1.2(b) provides that the parties will ob-

tain "first mortgage loans" through the ventures in the amount of $34,000,000 by pledging some of the properties as security.

Section 13 provides that "time is of the essence" and that "no joint venture, partnership or similar relationship shall exist between Leucadia and the Breslin Entities until the Ventures, *and the indebtedness under the Cargill Loans had been restructured.*" (Emphasis added.) And, again, the restructuring, - which required the Breslin Entities to enter into a "new" limited partnership or limited company" with Leucadia – had to "occur no later than December 15, 1999." Appellants fail to explain how this could occur absent, at the very least, a contract for refinancing being in place as of that date. Clearly, it could not be as a practical matter.

It is undisputed that no commitment for refinancing was in place by December 15, 1999. And contrary to the position espoused by appellants (Appellants' Br. at 16-20) Judge Cyganowski's factual findings that the lack of refinancing was not attributable, in whole or in part, to Leucadia, is well grounded in the record, particularly when measured against the clearly erroneous standard.

Notwithstanding the foregoing, it is true that the various subsections of section 1.2 are set forth serially, thereby suggesting – if the three partnership preconditions of section 13 are culled from the analysis – that the parties envisioned the ventures being established initially under section 1.2(a), to be followed by the ventures then obtaining the required new financing under section 1.2(b). So viewed, *only* the ventures had to be established by December 15, 1999. But even under

that serialized scenario, appellants were in breach of their contractual obligations as of December 15th because the restructuring of the properties, as required under section 1.2(a), had not occurred by that date.

Appellants also argue that the creation of the ventures, the concomitant contributions by the Breslin Entities, and the restructuring of the Cargill indebtedness, via the infusion of new monies, could all occur simultaneously. That may be true, but the fact remains the three-part contractual process could not come about absent the new financing.

In sum, the Court concludes that Judge Cyganowski's determination that the July 2nd agreement was an integrated, unambiguous statement of the parties' understanding (as urged by both parties,) and her conclusion as to the meaning of that agreement, are correct. The record more that adequately supports her finding that December 15, 1999 was a dispositive deadline breached by the Breslin Entities.

3. "Notwithstanding" Language of Section 1.4

But what about the "notwithstanding" language contained in the last full sentence of section 1.4? Appellants contended that they had the option of demanding that Leucadia consensually foreclose one or more of the properties securing the Cargill loan on or before December 15, 1999, in lieu of meeting the December 15th deadline for restructuring. The sentence cited, if read alone, supports appellants' argument. But contractual provisions must be read together, not in isolation. *Empire Corp. v. Manufacturers Trust Co.*, 288 N.Y. 248, 43 N.E.2d 25, 28 (1942); *Int'l Klafter Co. v. Continental Gas. Co.*, 869 F.2d 96, 99-100 (2d Cir. 1989). In this

case, that means that the consensual foreclosure language must be considered in conjunction with the verbiage which immediately follows, viz., " in furtherance of the restructuring contemplated under this agreement."[3] As previously explained, the linchpin for the section 1.4 restructuring was the obtaining of $34,000,000 from a third party lender to partially reimburse Leucadia for the $49,000,000 from a third – party lender to partially reimburse Leucadia for the $49, 000, 000 it paid for the Cargill loans.

Moreover, at the time Breslin demanded that Leucadia foreclose and "convey [the properties] to the appropriate Venture (as defined in the agreement)," no venture existed to receive the properties. That was because appellants would not contribute properties to a venture absent refinancing. To do so, as explained by the Chief Financial Officer of the Breslin Entities, would have triggered" 'potentially severe [adverse] income tax consequences to Mr. Breslin and [two of his partners].'" (Tr. of four day trial in bankruptcy court ("Trial Tr.") at 588-89).)

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[3] Parenthetically, the record substantiates appellants' position that the "notwithstanding" sentence of section 1.4 was included for the reason cited in Leucadia's letter in response to Breslin's December 14th demand, i.e., "to assist [Breslin] in the event one or more of [his] partners refused to cooperate with the restructuring (Pls.' Ex. .3)." (*See, e.g.,* Defs. ' Ex. 38, at 2, ¶ 2.b.) ("If Pecunies does not consent to the proposed reorganization of the Debtors, the option of foreclosure of the Scutti Property by Leucadia, Inc. or delivery to Leucadia, Inc. of a deed in lieu of foreclosure of the Scutti Property, pursuant to the Plan of Reorganization, may have to be implemented. ...

Judge Cyganowski rightfully rejected the "fail-safe" interpretation of the "notwithstanding" portion of section 1.4 proffered by appellants. To conclude otherwise would ignore the refinancing purpose of the July 2nd agreement as stated in section 1.2, as well as the modifier to the consensual foreclosure language in section 1.4, to wit, that such conduct be "in furtherance of the restructuring contemplated under [the] agreement." A consensual foreclosure to circumvent the objection of a Breslin partner would be in furtherance of the restructuring. A consensual foreclosure on the basis articulated by appellants would not have been.

The Breslin Entities seek to buttress their position regarding the "notwithstanding" portion of section 1.4. by contending that the decision under review is obviously flawed because (1) it fails to take into account section 9 of the agreement, and (2) if refinancing had to be in place by December 15, 1999, there would be no properties thereafter to foreclose, rendering the "notwithstanding" language of section 1.4 meaningless.

These additional, essentially subsidiary arguments will be addressed seriatim.

4. Section 9 of the Agreement

Section 9 provides:

> Rights of Sale. Commencing upon the first day of the thirty-seventh (37th) month after the Closing Date hereunder, and continuing annually thereafter, either party shall have the right to demand that any one or more of the Properties be sold at the highest possible available and attainable price. Each party

> shall also have such right in the event the New Financing is not in place on the properties by December 15, 1999. In the event of any such sale, either party shall the right to bid for and acquire the Properties from the Venture(s) upon market terms and conditions.

According to appellants, "section 9's import illustrates the misunderstanding of the Agreement by the Bankruptcy Court when the Court held that 'refinancing' had to be in place by December 15, 1999." (Appellants' Br. at 21.)

The bankruptcy court did not specifically discuss section 9. Appellees maintain that appellants are procedurally "barred by the application of collateral estoppel [from broaching this issue now] since it was never raised during the adversary proceeding."
(Appellees' Br. at 23-24.) Appellants have ignored the procedural challenge.

Nonetheless, this Court has considered section 9 since it is part of the subject agreement which must be read in its entirety to determine its meaning. Additionally, the Breslin Entities did refer to the paragraph in arguing their in limine motion before Judge Cyganowski on July 13, 2000. (Tr. 7/13/00 Proceeding at 22.)

In any event, a perusal of section 9 does not render the bankruptcy court's rejection of appellants' fail-safe argument erroneous. Moreover, it does not elevate the alternate interpretation of section 1.4 advanced by appellants to the status of being reasonable.

The first sentence of section 9 provides, in essence, an in futuro escape mechanism. Had the parties become joint venturers pursuant to sections 1.2 and 13, either could, after passage of the requisite period of time, cause one or more of the properties to be sold at the highest available price.

Under the second sentence of section 9, each party would have a right to demand an immediate sale if "New Financing was not in place on the Properties by December 15, 1999.

The third sentence, via its inclusion of the word "Venture(s), "arguably lends support to appellants' position that the parties contemplated becoming joint venturers even if no third-party financing was ever procured. However, that interpretation may not be reconciled with section 1.4's explicit direction that section 1.2 restructuring "must occur no later than December 15 1999," or with section 13's mandate of what must occur for a partnership to be formed.

In inclusion of "Venture(s)" in the third sentence could represent, inter alia, a recognition that Leucadia could have waived strict compliance with the deadline which conceivably they would have done had the prospect of a third-party lender been somewhere on the horizon as of mid-December 1999. Moreover, elsewhere in the agreement that term is used where it is clearly not intended to suggest the Breslin Entities and Leucadia were - at the time referred to in the section - members of a "limited partnership or limited liability company." i.e., "Ventur[ers]" under section 1.2 (a). Thus, section 12 calls for the "Ventures" to pay the $500,000 in brokerage fees incurred in early July 1999 as a result of Leucadia's purchase of Cargill loans.

In sum, reference to section 9 does not support appellants' position that Judge Cyganowski misunderstood the July 2nd agreement or that her decision awarding judgment to Leucadia was flawed.

5. Bankruptcy Courts' Interpretation of July 2nd Agreement did not Render the Last Sentence of Section 1.4 Meaningless

Appellants maintain:

> If, as the Court held, the refinancing had to be in place before December 15, 1999, the holder of the first mortgage loan would have been a third-party lender which had "refinanced" the debt theretofore held by LEUCADIA. Taking into account the absence of any operative significance of the second mortgage language, in view of the BUSY BEE sale, no debt would have then remained as of December 15, 1999. If no debt was owed to LEUCADIA on December 15, 1999, LEUCADIA would have had no mortgage to foreclose and LEUCADIA would have had to no authority or right to commence any consensual foreclosure because it would have had no debt to foreclose. On such facts, the "Notwithstanding the foregoing ..." clause would have been a superfluous provision. One could not foreclose a debt that does not exist.

(Appellants' Br. at 22.)

The uncontroverted trial evidence indicates that a purpose of the consensual foreclosure provision was to permit the section 1.2(a) restructuring to occur in the event one or more

of Breslin's partners objected.[4] As such, rather than being an alternative to refinancing, the mechanism, if appropriately utilized, would have served to promote the interrelated restructuring and refinancing processes delineated in the agreement. Under such circumstances, the subject provision would have been far from "meaningless."

Moreover, the predicate for appellants' "meaningless" argument is that the $11,000,000 second mortgage no longer existed as of December 15, 1999, having been satisfied via a post-July 2nd sale of the Busy Bee properties.

However, the circumstances existing at the time the contract was assigned is the appropriate point of reference, not what transpired thereafter. As of July 2nd the Busy Bee properties had not been sold.

CONCLUSION

For the reasons indicated, the Judgment of the bankruptcy court is affirmed. The Clerk of Court is directed to mark this case as closed.

SO ORDERED.

Dated: March 20, 2002

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[4] Appellants maintain that was the *sole* reason for the clause's inclusion. (*See* discussion *supra* note 3.) In Breslin's testimony before Judge Cyganowski, he indicated that it was *one* of the reasons. (Trial Tr. at 665-66 ("[T]hat provision was there for a purpose, to avail ourselves of a mechanism as to if , as and when the financing had not been obtained, *or* any of the partners had been obstructionist, there was mechanism to make this deal and put these assets into the venture." (emphasis added)).)

Central Islip, New York

DENIS R. HURLEY, U.S.D.J.

APPENDIX E - ORDER OF JUDGE CYGANOWSKI, DATED AUGUST 7, 2000

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF NEW YORK

In re:

BAY HARBOUR ASSOC, LP.,	Chapter 11
Debtor	Case No. 899-85379-511
BUSY BEE ASSOC, LP.,	Chapter 11
Debtor,	Case No. 899-85378-511
HUNTINGTON SQUARE ASSOC, LP.,	Chapter 11
Debtor,	Case No. 899-85377-511
ROCHESTER ASSOCIATES, LP.,	Chapter 11
Debtor,	Case No. 899-85376-511
VERLEYE & JERICHO ASSOC, LP.,	Chapter 11
Debtor,	Case No. 899-85375-511
DOYLE REALTY, LLC.,	Chapter 11
Debtor,	Case No. 899-85374-511
	Jointly Administered

In re:

RIVERWOOD LAPLACE ASSOC-, LLC., Case No. 897-89417-511
Debtor,

BAY HARBOUR ASSOC, LP.;	
HUNTINGTON SQUARE ASSOC, LP.;	
ROCHESTER ASSOC, LP.; VERLEYE	Adv. Pro. No.
& JERICHO ASSOC, LP.; and	800-8130-511
RIVER WOOD LAPLACE ASSOC, LP.,	
Plaintiffs,	

-against

LEUCADIA NATIONAL CORPORATION,
LEUCADIA, INC. and LUK-SHOP LLC.,
Defendants.

Order Correcting Errata in Decision Dated August 4, 2000

On August 4, 2000, Court rendered a written decision with respect to the trial of the adversary proceeding in the above-captioned matter.

Upon review, the court noted a typographical error that appears in the first full paragraph on page 49 of that decision. The word "not" was inadvertently omitted ftom the second line of the first sentence. More specifically, the first sentence of the first full paragraph appearing on page 49 should read as follows:

"Not surprisingly, and perhaps in large part because of the Plaintiffs' inconsistent positions, the trial record does ***not*** support the Plaintiffs' contentions."

The parties should correct their copies accordingly. The Clerk is directed to serve a copy of this Order upon all parties who were served copies of the written Decision on August 4, 2000.

So Ordered.

HON. MELANIE CYGANOWSKI
United States Bankruptcy Judge

DATED: Hauppauge, New York
August 7, 2000

APPENDIX F - JUDGMENT AFTER TRIAL OF JUDGE CYGANOWSKI DATED AUGUST 4, 2000

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF NEW YORK

In re:

BAY HARBOUR ASSOCIATES, L.P.,	Chapter 11
Debtor,	Case No. 899-85379-511
BUSY BEE ASSOCIATES, L.P.,	Chapter 11
Debtor,	Case No. 899-85378-511
HUNTINGTON SQUARE ASSOC, L.P.,	Chapter 11
Debtor,	Case No. 899-85377-511
ROCHESTER ASSOCIATES, L.P.,	Chapter 11
Debtor,	Case No. 899-85376-511
VERLEYE & JERICHO ASSOC, L.P.,	Chapter 11
Debtor	Case No. 899-85375-511
DOYLE REALTY, L.L.C.,	Chapter 11
Debtor,	Case No. 899-85374-511
	Jointly Administered

In re:
RIVERWOOD LAPLACE ASSOC, L.L.C., Case No. 897-89417-511
Debtor,

BAY HARBOUR ASSOC, L.P.; HUNTINGTON SQUARE ASSOC, L.P.; ROCHESTER ASSOC, L.P.; VERLEYE & JERICHO ASSOC, L.P.; and RIVER WOOD LA PLACE ASSOC, L.P., Plaintiffs,	Adv. Pro. No. 800-8130-511
-against-	**JUDGMENT AFTER TRIAL**
LEUCADIA NATIONAL CORP, LEUCADIA, INC.and LUK-SHOP L.L.C., Defendants.	

1. The Court has jurisdiction over the parties and the subject matter, and venue is proper.

2. For the reasons set forth in the Decision dated August 4, 2000, which Decision constitutes the Court's Findings of Fact and Conclusions of Law, judgment is hereby rendered in favor of the Defendants and against Plaintiffs'; as to all claims for relief in Plaintiffs' complaint.

3. For the reasons set forth in the Decision dated August 4, 2000, which Decision constitutes the Court's Findings of Fact and Conclusions of Law, judgment is hereby rendered in favor of the Defendants and against Plaintiffs' as to Defendants' counterclaim.

Clerk to enter Judgent forthwith.

HON. MELANIE CYGANOWSKI
United States Bankruptcy Judge

DATED: Hauppauge, New York
August 4, 2000

APPENDIX G – DECISION OF JUDGE MELANIE L. CYGANOWSKI, DATED AUGUST 4, 2000

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF NEW YORK

In re:	
BAY HARBOUR ASSOCIATES, L.P.,	Chapter 11
Debtor,	Case No 899-85379-511
BUSY BEE ASSOCIATES, L.P.,	Chapter 11
Debtor,	Case No.899-85378-511
HUNTINGTON SQUARE ASSOC., L.P.,	Chapter 11
Debtor,	Case No. 899-85377-511
ROCHESTER ASSOCIATES, L.P.,	Chapter 11
Debtor,	Case No. 899-85376-511
VERLEYE & JERICHO ASSOCIATES, L.P.,	Chapter 11
Debtor,	Case No. 899-85375-511
DOYLE REALTY, L.L.C.,	Chapter 11
Debtor.	Case No. 899-85374-511
	Jointly Administered
In re:	
RIVERWOOD LA PLACE ASSOC., L.LC.,	Case No. 897-89417-511
Debtor.	

BAY HARBOUR ASSOCIATES, L.P.; HUNTINGTON SQUARE ASSOC, L.P.; ROCHESTER ASSOC., L.P.; VERLEYE & JERICHO ASSOCIATES, L.P.; and RIVERWOOD LA PLACE ASSOC, L.P.,	Adv. Pro. No. 800-8130-511
Plaintiffs,	
-against-	**NOT FOR PUBLICATION**
LEUCADIA NATIONAL CORP, LEUCADIA, INC. and LUK-SHOP L.L.C.,	***DECISION AFTER TRIAL***
Defendants.	

HON. MELANIE L. CYGANOWSKI, United States Bankruptcy Judge:

The Court held a trial of the issues presented in the above-captioned adversary proceeding on July 18, 19, 20 and 21, 2000. This decision constitutes the Court's findings of fact and conclusions of law to the extent that the same are required by Fed. R. Bankr. P. 7052.

Background: The Parties

Bay Harbor Associates, L.P. ("Bay Harbor"), Busy Bee Associates, L.P. ("Busy Bee"), Huntington Square Associates, L.P. ("Huntington Square"), Rochester Associates, L.P. ("Rochester Associates"), Verleye & Jericho Associates, L.P. ("V&J"), and Doyle Realty, L.L.C. ("Doyle") (collectively referred to as the "Debtors") filed separate voluntary petitions seeking relief under Chapter 11 of Title 11 of the United States Code on June 24, 1999. These bankruptcy filings followed an agreement between the Debtors and their affiliates, on the one hand, and the secured creditor at that time, CFSC Capital Corp. XXVI *("CFSC"* or "Cargill").[1] The Cargill agreement was made on February 12, 1999 be-

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[1] The pre-petition lender to the Debtors and Riverwood is also known as Cargill Financial Services Corporation or "Cargill." From time to time, the parties simply refer to the various loans provided by CFSC or Cargill as the "Cargill Loans." For a complete description of the Cargill Loans, *see* Defs. Trial Exhibit 5, the "Estoppel Certificate" and, specifically, Exhibit A thereto, which consists of 18 pages of single-space itemization of each loan agreement, promissory note and other agreement as between the Debtors and their affiliated parties, and Cargill.

fore the United States Bankruptcy Court for the Eastern District of New York in a Chapter 11 proceeding commenced by Riverwood LaPlace Associates, L.L.C. ("Riverwood") in 1997. Riverwood emerged from bankruptcy as a reorganized debtor on July 15, 1999 after its plan of reorganization was confirmed by this Court.

At the time of the settlement agreement with Cargill, the properties of the Debtors were under the control of two Receivers and were the subject of two foreclosure proceeding pending in the Supreme Court of the State of New York in the Counties of Nassau and Suffolk. In the foreclosure proceedings, Cargill asserted a cross-collateralized secured claim against the Debtors' properties The Cargill agreement provided, *inter alia,* that the Debtors and Riverwood had until July 16, 1999 to pay to Cargill the sum of $49 million (including $1.5 million which was paid shortly after February 12, 1999) or deliver to Cargill the deeds to all properties that secured the Cargill indebtedness. The Cargill agreement further provided that it was to be effectuated through the consensual pre-packaged Chapter 11 Plans of Reorganization filed by Cargill. *See* Trial Exh. 15B: the "Amended Joint Disclosure Statement Pursuant to Section 1125 of the Bankruptcy Code for Joint Chapter 11 Plan of Reorganization for Busy Bee Associates, L.P., Verleye & Jericho Associates, L.P. and Doyle Realty, L.L.C." (the " Amended Joint Disclosure Statement"), filed on January 14, 2000, at 6-7. In furtherance of this settlement, the Debtors filed their Chapter 11 petitions and moved almost immediately for authority to enter into an agreement with Leucadia, Inc.

On July 7, 1999, the Court entered an Order that, *inter alia*, authorized the Debtors to enter into the agreement with Leucadia, Inc. ("Leucadia") or one of its affiliates or designees. That agreement, which is between the Debtors, Riverwood and other affiliated parties, on the one hand, and Leucadia, on the other hand, is dated July 2, 1999 and forms the heart of this litigation. *See* Pl. Trial Exh. 1 (the "July 2nd Agreement").

As a consequence of the July 2nd Agreement, Leucadia, through its designee Luk-Shop, L.L.C. ("Luk-Shop"), purchased the secured debt and all other claims of Cargill on July 8, 1999. At the closing that took place with respect to the take-out of the Cargill debt, the mortgage on the Doyle property was satisfied in full and was no longer encumbered.

The instant adversary proceeding was commenced on April 14, 2000 by the Debtors (excluding Doyle), together with Riverwood (collectively, the "Plaintiffs," the "Debtors" or the "Breslin Entities"), against Leucadia National Corporation, Leucadia and Luk-Shop (collectively referred to as "Leucadia" or the "Defendants," unless specific reference to a particular party is required).

The Pleadings

The Complaint alleges five causes of action. In brief, they are as follows: the first cause of action seeks a declaration that the July 2nd agreement between the parties did not require the Plaintiffs to obtain financing for the joint venture(s) by December 15, 1999 and that the Plaintiffs have a reasonable amount of time within which to obtain such financing. The second cause of action seeks both compensatory and pu-

nitive damages in an amount to be determined at trial, but believed to be at least $60 million, for an alleged breach of fiduciary duty owed to Plaintiff by Defendants. The third cause of action seeks compensatory damages for breach of the July 2nd agreement. The fourth cause of action seeks a judgment directing Defendants to specifically perform their obligations under paragraphs 1.2(b) and 6 of the July 2nd agreement and "apply for and obtain the Refinance Mortgage Loans for the Properties." Finally, the fifth cause of action seeks a judgment directing the Defendants to specifically perform their obligations under paragraph 1.4 of the July 2nd agreement and foreclose upon the properties in a consensual, voluntary foreclosure "and, thereafter, convey the Properties to Ventures owned by Plaintiffs and Leucadia."

By their Answer, the Defendants deny, for the most part, all material allegations as against them and assert two affirmative defenses and one counterclaim. The first affirmative defense and counterclaim allege that (i) the July 2nd Agreement expressly provides that no joint venture would come into existence unless three conditions were satisfied, and that time was of the essence, (ii) Plaintiffs failed to satisfy any of the three conditions within the time specified, and (iii) the Defendants are therefore entitled to judgment declaring that Luk-Shop is entitled to enforce all of the rights and remedies available to it as the holder of the CFSC loans. As a second affirmative defense, Defendants allege that Plaintiffs "were not ready, willing and able to perform their express obligations by the time fixed by the Agreement for such performance."

The Pre-Trial Proceedings

On July 13, 2000, prior to the trial, the Court heard and determined certain motions *in limine* that were made by the parties. Those rulings are reflected in the transcript of that day. By its decision, the Court held that the July 2n[d] Agreement is fully integrated, that it is clear and unambiguous on its face, and that, therefore, the parol evidence rule bars the introduction of evidence of prior or contemporaneous oral or written statements for the purpose of adding to, varying, or modifying its terms. The Court also made several evidentiary rulings at trial based upon the parol evidence rule.

In reaching this conclusion, the Court considered that the parol evidence rule is a substantive rule of contract law, not a rule of evidence. *Garza v. Marine Transport Lines. Inc.*, 861 F.2d 23 (2nd Cir. 1988). The rule states that "[w]hen two parties have made a contract and have expressed it in a writing to which they have both assented as the complete and accurate integration of that contract, evidence, whether parol or otherwise, of antecedent understandings and negotiations will not be admitted for the purpose of varying or contradicting the writing." *Id.* at 26; *see also United States Fire Ins. Co. v. General Reinsurance Corp.*, 949 F.2d 569, 571 (2d Cir. 1991) (parol evidence rule requires exclusion of conversations, negotiations or agreements made prior to or contemporaneous with a written contract). In other words, "evidence outside the four corners of the document as to what was really intended but unstated or misstated is generally inadmissible to add to or vary the writing." *W.W.W. Assoc. v. Giancontieri*, 77 N.Y.2d 157, 162,5 66 N.E.2d 639, 565 N.Y.S. 2d 440, 443 (1990).

The rule is designed to enhance the stability of commercial transactions by "safeguarding against fraudulent claims, perjury, death of witnesses ... infirmity of memory ... [and] the fear that the jury will improperly evaluate the extrinsic evidence." *Id.* at 163, 565 N.Y.S.2d at 443 *(quoting* Fisch, New York Evidence § 2, at 22 [2nd ed]); *Garza, supra,* at 26. Accordingly, it bars proof of an oral agreement that adds to or varies the terms of a written contract which was intended to represent the entire agreement between the parties, *Albany Savings Bank, FSB v. Halpin,* 117 F.3d 669, 672 (2d Cir.l 997), and effectively precludes an action to enforce a prior oral agreement which is inconsistent with the written one. *Independent Energy Corp. v. Trigen Energy Corp.* 944 F. Supp. 1184 (S.D.N.Y. 1996).

When ruling upon the applicability of the parol evidence rule, a court must first determine whether the contract was intended to embody the parties' entire agreement – whether it is integrated. The writing itself need not expressly state that it constitutes the full and final expression of the agreement. *Intershoe Inc. v. Bankers Trust Co.,* 77 N.Y. 2d 517, 571 N.E.2d 641, 569 N.Y. S. 2d 333 (1991) (construing the UCC's version of the parol evidence rule). However, in the absence of such a "merger" clause, the court must determine whether the contract is integrated by reading it "in the light of surrounding circumstances, and by determining whether or not the agreement was one which the parties would ordinarily be expected to embody in writing." *Independent Energy Corp., supra,* at 1196 *(quoting Braten v. Bankers Trust Co.,* 60 N.Y. 2d 155,468 N. Y. S.2d 861,864 (1983 A contract that appears complete on its face is an integrated agreement as a matter of law. *Id.*

In addition, the parol evidence rule does not bar admission of extrinsic evidence where the contract is ambiguous, since integration and ambiguity are not mutually exclusive. Even where a contract is fully integrated as to the terms of the parties' agreement, the meaning of those terms may be unclear. In those instances in which extrinsic evidence is admitted to interpret the meaning of ambiguous contract terms, "the parol evidence rule is inoperative, and the evidence is not considered to vary or contradict the terms of an integrated agreement; rather, the parol is used to determine what the terms of the agreement are." *Garza v. Marine Transport Lines Inc., supra* at 26-27 (internal citations omitted).

The question of whether the language of a contract is ambiguous is a threshold question of law for the court, *Albany Savings Bank FSB v. Halpin, supra* at 672; *Independent Energy Corp. v. Trigen Energy Corp., supra,* to be decided based upon a reading of the contract as a whole to determine its purpose and intent. *MJ. Peterson Real Estate Inc., v. Krantz,* 641 N.Y.S.2d 942, 943 (App. Div. 1996). Whether or not an ambiguity exists must be determined from the face of the agreement, without regard to extrinsic evidence. *Schmidt v. Magnetic Head,* 468 N.Y.S.2d 649, 653 (App. Div. 1983). In other words, extrinsic evidence is not admissible to create an ambiguity. *W.W.W. Assoc. v. Giancontieri, supra.* Where the contract is unambiguous, the "intent of the parties must be determined from their final writing and no parol evidence or extrinsic evidence is admissible." *Independent Energy Corp. v. Trigen Energy Corp., supra (quoting International Klafter Co. v. Continental Gas. Co.*, 869 F.2d 96, 100 (2d Cir.1989) (citations omitted). But where it

is ambiguous, parol evidence is admissible to interpret the ambiguous terms.

An ambiguous contract is one "which is capable of more than one meaning when viewed objectively by a reasonably intelligent person who has examined the context of the entire integrated agreement and who is cognizant of the customs, practices, usages and terminology as generally understood in the particular trade or business." *Albany Savings Bank, FSB, supra* at 673. Where there is no reasonable basis for a difference of opinion, the contract is not ambiguous. *Red Rock Commodities, Ltd. v. Standard Chartered Bank,* 140 F.3d 420, 424 (2d Cir. 1998); *see also Independent Energy Corn. v. Trigen Energy Corp., supra* at 1191-92.

A '[m]ere assertion by one that contract language means something to him, where it is otherwise clear, unequivocal and understandable when read in connection with the whole contract, is not in and of itself enough to raise a triable issue of fact.'" *Unisys Corporation v. Hercules Incorporated,* 638 N.Y.S.2d 461,463 (App. Div.1996) *(quoting Federal Deposit Ins. Com. v. Herald Sa. Fabrics Corp.,* 81 A.D.2d 168, 180,439 N.Y.S.2d 944, *appeal dismissed,* 55 N.Y.2d 602, 447 N.Y.S.2d 1025. A contract is not ambiguous simply because the parties embrace different interpretations. *Independent Energy Corp., supra.* Nor does ambiguity exist where one party's view "strain[s] the contract language beyond its reasonable and ordinary meaning," *Independent Energy Corp., supra* at 1191-92, or where there is an omission or mistake in the contract, *Schmidt v. Magnetic Head Corp.,* 468 N.Y.S.2d 649 (App. Div. 1983).

The Trial

As noted, the trial took place on July 18, 19, 20 and 21, 2000.[2] The testimony of the following persons was given: Lawrence Hershfield; Lawrence D. Ackman; Joseph Orlando; Mark Hornstein; Beth Alderman; Martin Schackner; and Wilbur Breslin. In addition, the Court received into evidence excerpts of deposition testimony of Wilbur Breslin, Paul Berger, Joseph Steinberg and Cory Dryer.

The following exhibits were received into evidence: Plaintiffs' Exhibits 1-4, 19-49, 50, 51, 53-56, 58, 61-80, 83, 87, 88, 92-97, 102-105, 123-146, 151-186, 188-208, 211-230, 230A, 231-233 and 255. In addition, the Court also received into evidence Defendants' Exhibits 5, 9-21, 23 (in part), 25 & 26 (in part), 29, 30, 32-34, 36-39, 41-43, 46-51, 53, 55-80. Collectively, these documentary exhibits are found in no less than ten large binders. The trial testimony totals approximately 750 pages.

At the conclusion of the Plaintiffs' case in chief, the Defendants made an oral application for a directed judgment in their favor, pursuant to Fed. R. Civ. P. 52(c) as made applicable by Fed. R. Bankr. P. 7052, on the First, Second and Third Causes of Action: The Court reserved decision. Defendants then concluded their case, without prejudice to their Rule 7052(c) motion.[3] The Court permitted the parties to

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[2] All references to "Tr." or to "Trial Tr." herein are to the consecutively paginated trial transcript, unless otherwise specified.

[3] The Defendants' case was limited to the introduction of Def. Exh. 46 and certain excerpts from the deposition testimony of Paul Berger and Wilbur Breslin.

proffer their closing arguments within their post-trial submissions. *See* "Plaintiffs' Post-Trial Memorandum of Law," filed on July 27, 2000, and "Defendants' Post-Trial Memorandum of Law," also filed on July 27, 2000.

The July 2nd Agreement

The signatories to the July 2nd Agreement are: (i) each of the Debtors; (ii) Riverwood; (iii) Breslin Realty Associates; (iv) Breslin Realty Associates, L.L.C.; (v) Breslin Realty Development Corporation; and (vi) Leucadia, Inc. (collectively, the "Signatories"). By the July 2nd Agreement, Leucadia agreed, pursuant to certain terms, to

> taking an assignment of [the Plaintiffs'] rights to acquire and acquiring the outstanding mortgage financing with respect to 'the properties securing the outstanding financing from the Cargill Entities and restructuring the ownership and financing arrangements with respect to each of the properties (the "Properties") securing the Cargill Loans (as hereinafter defined) and the debt ...."

See Pl. Trial Exhibit 1 at 1.

Salient provisions of the July 2nd Agreement include the following:

Paragraph 1.1

Acquisitions. The existing first mortgage financing outstanding and owed by the Breslin entities named as addresses above (the "Breslin Entities") to the Cargill Entities (the "Cargill Loans") will be

purchased by Leucadia from the Cargill Entities for $49 million. Upon the closing of the acquisition of the Cargill Loans as contemplated herein, Leucadia will (a) return to Wilbur F. Breslin the $1,500,000 deposit previously made by Wilbur F. Breslin with the Cargill Entities, (b) to the extent obtained from the Cargill Entities, return and assign to Wilbur F. Breslin all life insurance policies on Wilbur F. Breslin, and (c) release the lien of the Cargill Loans from the Doyle Court Property. The Breslin Entities hereby consent to the acquisition of the Cargill Loans from the Cargill Entities by Leucadia as contemplated herein.

Paragraph 1.2

Purpose. The purpose of Leucadia's acquisition of the Cargill Loans is to allow for a restructuring and refinancing of the Properties with the Breslin Entities as follows:

a. The Breslin Entities will enter into new limited partnership or limited liability company arrangements (the "Venture(s)") with Leucadia such that the Breslin Entities would contribute 100% of their interests in the Properties (and the partnerships that own the Properties) (but not the Doyle Court Property) to the Venture(s) in exchange for fifty percent (50%) of the equity interest in the Venture(s). The parties will proceed to establish the Venturers [sic] and make such contributions of the Ventures will

be consistent with the terms and conditions of this agreement.

b. Leucadia and the Breslin Entities will obtain the Venture(s) new cross collateralized first mortgage loans (the "First Loan") with respect to certain of the Properties in the approximate aggregate amount of $34 Million.

c. Leucadia will convert its interest in the Cargill Loans to new cross collateralized second mortgage loans (the "Second Loans") with respect to the Properties in the approximate aggregate amount of $ 11 Million (with the understanding that the Second Loans will be in a first position on the Properties not included in the First Loan).

d. The difference of $4 Million between (i) the aggregate total of the First Loan and Second Loans and (ii) the amount of Leucadia's purchase price of $49 million shall be Leucadia's equity contribution for fifty percent (50%) of the Venture(s).

e. The equity in the Venture(s) will then be owned fifty percent (50%) by Breslin and the Breslin Entities (including any existing unrelated partners that Breslin may have in any or all of the Breslin Entities) and fifty percent (50%) by Leucadia. Governance of the Venture(s) shall be divided equally in a fifty-fifty manner between the Breslin Entities and Leucadia, by two co-managing members, one designated by Breslin and one designated by Leucadia.

Paragraph 1.3 defines the term "Restructure Date" as: "implementation of the restructuring of the ownership of the Properties as contemplated in Section 1.2 of this agreement."

Paragraph 1.4

Forebearance. [sic] Leucadia will agree not to exercise any of the rights or remedies under the Cargill Loans, including prosecution of foreclosure actions, pending the Restructure Date, which must occur no later than December 15, 1999. If the Restructure Date has not occurred by December 15, 1999, Leucadia shall be free to exercise any rights or remedies under the Cargill Loans. The Breslin Entities acknowledge that after the Closing Date no rights exist to acquire the Cargill Loans for any amount less than the accrued and unpaid debt under the Cargill Loans. From the Closing Date and until the Restructure Date, the Properties will be managed in the manner contemplated in Section 5 of this agreement. Notwithstanding the foregoing, if the Breslin Entities request that Leucadia foreclose any one or more of the Cargill Loans prior to December 15, 1999 in a consensual foreclosure in furtherance of the restructuring contemplated under this agreement, Leucadia will agree to do so and cause the properties covered by such consensual foreclosure to be conveyed to the appropriate Venture.. [sic]

Paragraph 5 provides, in part:

Management. Day to day management of the Properties in the Venture(s) shall be by the Breslin Entities, subject to normal operating performance criteria (such as a mutually agreeable annual business plan) acceptable to Leucadia. A representative of Leucadia shall be part of the management team and work with the Breslin Entities with respect to management of the Properties. Management of the Properties and the Venture(s) shall allow and the Properties shall bear a management fee of five percent (5%) of revenues, allocable and payable three and one-half percent (3½ %) to the Breslin entities and one and one-half percent (1½ %) to Leucadia. Management fees will be subordinated to debt service on the First Loan and payment of interest on the Second Loans. Counsel for the Ventures shall be chosen jointly by Leucadia and the Breslin Entities....

Paragraph 9

Rights of Sale. Commencing upon the first day of the thirty-seventh (37th) month after the Closing Date hereunder, and continuing annually thereafter, either party shall have the right to demand that any one or more of the Properties be sold at the highest possible available and attainable price. Each party shall also have such right in the even the New Financing is not in place on the Properties by December 15, 1999. In the event of any such sale,

either party shall have the right to bid for and acquire the. Properties from the Venture(s) upon market terms and conditions.

Paragraph 12

Closing Date. ... [A]fter closing the Ventures shall pay a fee in the aggregate amount of $500,000 to Glenn Myles for brokerage and finders services.

Paragraph 13

Entire Agreement. This agreement represents the entire agreement between the parties hereto with respect to the subject matter hereof and supercedes all prior oral and written agreements and commitments. This agreement is not a joint venture agreement and no joint venture, partnership or similar relationships shall exist between Leucadia and the Breslin Entities until the Ventures are formed, the Properties are contributed to the Ventures, and the indebtedness under the Cargill Loans has been restructured. ...Time is of the essence of this agreement ....

Arguments of the Parties

Plaintiffs rely upon four primary arguments. First, they assert that the Defendants acted intentionally, with a predetermined objective to attempt to wipe out the equity of the Breslin parties, by failing to comply with their contractual obligations. Specifically, the Plaintiffs argue that the Defendants did not diligently proceed, as they were required under the July 2nd Agreement, to obtain the necessary financing for

the ventures; that they failed to create the ventures; and further, that they failed to foreclose upon the Cargill loans, upon the written demand of the Plaintiffs on December 14, 1999 *(see* Pl. Exh. 2), as they were required under ¶1.4. With specific respect to 1.4 of the July 2nd Agreement, the Plaintiffs urge that this provision could never have contemplated the execution of joint venture agreements or operating agreements since, by definition, a foreclosure sale wipes out any interests that exist prior to the foreclosure being commenced. Thus, the Plaintiffs contend that ¶1.4 must have been intended to serve as an option in the event that new financing was not obtained or the joint ventures were not formed by December 15, 1999.

A second major argument of the Plaintiffs is that the Defendants did not diligently pursue their obligation to get new financing for the Ventures. The Plaintiffs point to a gap of approximately 7 weeks between August 12, 1999 (the date of a signature on an application to be presented to GECC for possible financing; *see* Pl. Exh. 132) and October 7, 1999 (the date of a meeting that took place at Leucadia' office with respect to securing possible financing from GECC). The Plaintiffs contend that by failing to sign any applications to GECC during this period, the Defendants acted in bad faith and in breach of the July 2nd Agreement. Plaintiffs further urge that it is probable that the GECC loan would have funded and closed prior to December 15, 1999, but for the Defendants' failure to timely perform.

The third major argument of the Plaintiffs is that the July 2nd Agreement does not, by its express terms, require that the new financing be obtained by December 15, 1999. They

point out that the reference to December 15, 1999 within '1.4 is, at most, limited to the anticipated restructuring of the Ventures and that the paragraphs dealing with the procurement of financing *(e.g.,* ¶¶1.2 and 2) do not contain any deadline.

The fourth major argument of the Plaintiffs is that the parties created a joint venture relationship as between and among themselves, immediately upon the signing of the July 2nd Agreement, notwithstanding the provisions of ¶¶13 of the Agreement to the contrary. Among other alleged indicia of this relationship were (i) the agreement between the parties to fund the $500,000 finder fee to Glen Myles (which, pursuant to ¶12, was not required to be paid until the closing of the Ventures), (ii) the parties cooperated with respect to leasing arrangements to the extent that the Breslin parties sought the consent of Leucadia prior to entering into certain leases, (iii) the parties cooperated and agreed to bid on certain leases that were being auctioned with the intention of contributing those leases to the joint Ventures, and (iv) management fees were paid in accordance with the agreement notwithstanding that the Ventures had not yet been formed.

For their part, the Defendants argue that the July 2nd Agreement sets forth a clear requirement that the new financing must be in place prior to December 15, 1999, failing which they had the right to proceed to foreclose upon the Cargill loans in accordance with state law. The Defendants concede that they shared a joint obligation to secure the new financing, but argue that upon the failure of the parties to secure new financing by that deadline, they were relieved of

any further obligation to create the joint ventures or continue in efforts to secure new financing.

The Defendants further contend that the July 2nd Agreement minimally required the creation of the joint ventures prior to December 15, 1999 and that, because the joint ventures were concededly not formed by that date, they are permitted to exercise their state law remedies with respect to the Cargill loans under ¶1.4 of the Agreement. They point out that no operating agreements for the joint ventures were ever signed by the parties, despite the fact that Leucadia's lawyers sent a draft of a model operating agreement to the Breslin parties as early as August 3, 1999. According to the Defendants, the Breslin parties feared certain adverse tax considerations in the event that the joint ventures were created prior to Leucadia being taken out as a lender.

The Defendants also dispute the Plaintiffs' contention that the joint ventures were formed upon the execution of the July 2nd Agreement, relying upon ¶13 of the Agreement. Among other things, the Defendants argue that the particular properties were never deeded to joint ventures, which was a necessary precondition to the formation of the joint ventures under that paragraph. Further, the Defendants note that Plaintiffs are precluded, in any event, from seeking to prove that the joint ventures had been formed notwithstanding the express words of ¶13 because of the Court's ruling with respect to parole evidence.

Finally, the Defendants assert that they cooperated and acted in good faith throughout the process of seeking financing. Among other things, Hershfield introduced the Breslin

parties to at least two mortgage brokers and several bankers. The Defendants acknowledge that the Breslin parties had the right to decline to pursue those initiatives, but urge that this hardly paints them as the non-cooperating party. Finally, they contend that the decision by GECC to not provide financing cannot be laid upon their shoulders, theorizing that the Breslin parties' lengthy history of litigation as reflected upon Breslin's credit reports was possibly the cause of GECC's decision.

Trial Motions

(1) Were all causes of action tried by the parties?

As noted, the Defendants moved for relief pursuant to Fed. R. Civ. P. 52(c) at the end of Plaintiffs', case in chief with respect to the first three causes of action in the complaint. The Plaintiffs then presented their argument in opposition. Prior to reserving decision, the Court requested clarification of the causes tried by the Plaintiffs in view of certain statements made during the opening argument. Specifically, during the course of his opening statement, Plaintiffs' counsel stated that the "second and third counts relate to damages, ... which we won't be pursuing at this time." *See* Trial Tr. at 10. The Plaintiffs then proceeded, however, to try their case for the ensuing four days on the issues of liability presented by the causes of action in their complaint. It was at this point that Plaintiffs asserted, for the first time after trial and after argument on the Rule 52(c) motion, that counts "2 and 3 are not a part of this." Trial Tr. at 736. Plaintiffs' counsel also stated that "before we started, ... it was clear that those monetary issues and those causes of action were not being

heard." Trial Tr. at 735. Defendants' counsel, not surprisingly, stated that he believed that counts 2 and 3 had been fully tried, except as to the amount of damages.[4]

With respect to this issue, the Court believes that the Plaintiffs did, in fact, rest their case with respect to all counts of the complaint and that they tried all of their causes of action, except for damages. This course of conduct was consistent with the stipulation entered into by the parties prior to trial, with the consent of the Court, bifurcating the issues of liability and damages at trial: *i.e.*, in the event that the Plaintiffs proved liability by a preponderance of the evidence at trial with respect to any cause of action at law, it was agreed that there would then be a subsequent trial limited to the issue of damages. This stipulation enabled the parties to limit discovery, prior to the beginning of the July 18th trial, to all issues raised by the pleadings, other than damages.

The Court is further persuaded of this conclusion by a review of the record. For instance, during the course of the pretrial conference on June 5, 2000, Plaintiffs' counsel stated that the parties had agreed to bifurcate the trial insofar as damages were concerned, and limit the first phase of the trial

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[4] In the words of Defendants', counsel: "I don't know where I was all this week, your Honor. I don't know where I was. If I didn't attend a trial at which Counts 2 and 3 were being tried, breach of obligation to obtain financing, perhaps 40 percent of the evidence presented affirmatively by these Plaintiffs -- concededly not on damages. We had total agreement, I did with Mr. Flint long before we commenced -- if we weren't trying Counts 2 and 3, I don't know what it was. Maybe it was a dress rehearsal in Boston and next week we will come back and try it again." Trial Tr. at 721, 736.

to the issues of liability only. *See* Tr. 6/5/2000, at 4. There was no discussion about deferring trial of the second or third cause of action. Indeed, a review of the parties' pre-trial memoranda of law shows that both parties were anticipating a trial of all the issues raised by the pleadings. *See* Plaintiffs' Pre-Trial Memorandum of Law, dated June 30, 2000, and Defendants' Pre-Trial Memorandum of Law, dated July 5, 2000. Second, the opening statement by Plaintiffs' counsel is, at best, ambiguous: "the second count relates to damages, your Honor, which we won't be determining." *See* Trial Tr. at 10. The statement may fairly be construed to mean that Plaintiffs' counsel was referring to *damages* not being determined, not to the liability on the second count. Third, there is no question but that Plaintiffs clearly and affirmatively placed into evidence a great deal of testimony, and a variety of documentary exhibits, which are relevant only to the second and third counts. Specifically, Plaintiffs introduced testimony and documents intended to prove that there was, in fact, a joint venture created (and that a fiduciary duty arose as a result, which is thrust of the second count), and that Defendants did not comply with their obligations under the agreement which might be argued to constitute either breach of a fiduciary duty (count 2) or breach of contract (count 3).

Fourth, when Defendants' counsel made his oral application for a directed verdict with respect to the first three counts, Plaintiffs' counsel raised no objection and, in fact, argued on the merits. Indeed, there was no suggestion by Plaintiffs that the second and third causes of action had not been tried fully and completely by them until after the Court requested clarification.

Fifth, the Plaintiffs have not argued that there is any prejudice that might flow from the conclusion that they fully tried their case. At the Pre-Trial Conference on July 6, 2000, Plaintiffs asked the Court to consider a motion *in limine* and to hold that the parol evidence rule applies to the Agreement. Plaintiffs argued that such an *in limine* ruling, if granted, would significantly narrow the issues, permitting them to substitute lead trial counsel at a late date and try the case in a matter of days, instead of the weeks originally contemplated, notwithstanding the late substitution of lead trial counsel. They did, in fact, make such a motion, and the Court granted it.

Finally, at no time since the Court's inquiry have the Plaintiffs requested the Court for a further opportunity to try the second and third causes of action. For all these reasons, the Court concludes that the Plaintiffs fully tried all of the causes of action alleged in their complaint, excluding any issues related to damages, which are expressly reserved for another date upon a verdict in favor of the Plaintiffs.

Although not directly implicated here, the Court is also guided by the principles of law underlying Rule 15(b) of the Federal Rules of Civil Procedure,[5] which allows amendments of pleadings to conform to the evidence when

> issues not raised by the pleadings are tried by express or implied consent of the parties ... [and] such amendment of the pleadings as may be neces-

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[5] Rule 15 governs amendments to conform to the evidence in an adversary proceeding by virtue of Rule 7015 of the Federal Rules of Bankruptcy Procedure.

> sary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues.

Fed. R. Civ. P. 15(b). On a motion to amend the pleadings to conform to the evidence;, a crucial issue "is whether the parties have consented to litigation of the issue; it must have been tried by their express or implied consent." *Id.* (citation omitted). Whether or not the parties have implicitly consented to try an issue not raised in the pleadings "depends on whether they recognized that the issue had entered the case at trial." *[d. (quoting* 6 C. Wright & A. Miller, FEDERAL PRACTICE AND PROCEDURE § 493, at 462 (1971)). Surely, if a matter may be tried by implied consent even where the pleadings do not raise the issue, it may be tried where they do, notwithstanding a perfunctory and conclusory statement by counsel that suggests the contrary.

(2) Defendants' Motion for a Directed Verdict

In seeking the grant of a directed verdict in their favor on the first three causes of action, the Defendants rely primarily upon the express words of the July 2nd Agreement. They argue that, however construed, the provisions of the July 2nd Agreement make it clear that the parties intended December 15, 1999 to be a deadline and that any failure to comply with that deadline permitted Leucadia to pursue its rights and remedies under the Cargill loans.

(a) The Standard of Review Under Rule 52(c)

Rule 52(c) provides, in pertinent part, that:

> If during a trial without a jury a party has been fully heard with respect to an issue and the court finds against the party on that issue, the court may enter judgment as a matter of law against that party on any claim ... that cannot under the controlling law be maintained ... without a favorable finding on that issue. .. .

The standard for determining Rule 52(c) motions has been described in several cases, including *Lamarca v.United States*,. 31 F. Supp. 2d 110, 123-24 (S.D.N.Y. 1998); *In re LTV Steel Co.*, 154 B.R. 29 (Bankr. S.D.N.Y. 1993), *Fechter v. Connecticut General Life lnsur. Co.*, 800 F. Supp. 182 (ED Penn. 1992); *Cherrey v. Thompson Steel Co., Inc.*, 80 5 F. Supp. 1257 (D. MD 1992), and *Price v. US Navy*, 818 F. Supp. 1323 (SD Cal 1992). In considering a motion for judgment for partial findings under Rule 52(c), the judge. as trier of the facts, must weigh and consider all of the evidence presented. The judge may deny defendant's motion at the close of plaintiff's case even though a *prima facie* case may have been presented. In reviewing defendants' motion, the Court is not to make special inferences in considering the evidence in plaintiff's case. Instead it is to weigh the evidence, resolve any conflicts in it and decide for itself where the preponderance lies. A plaintiff must satisfy its burden of proof by a preponderance of the evidence. Unlike a motion for directed verdict, the court need not determine that the defendant is entitled to judgment as a matter of law.

Notwithstanding the foregoing and the Court's decision to take the Rule 52(c) motion under advisement, Defendants' counsel stated on the record following Plaintiffs' Rule 52(c) argument that Defendants' entire case would take approximately ten minutes to present. Accordingly, the Defendants put on their case, without prejudice to their motion, and the trial record was closed. Because there is little practical difference between the trial record at the time of the Defendants' motion and the close' of the entire case, and because the standards of review are the same, the Court will exercise its discretion and decline to render a decision on the motion. Instead, this Decision will address all causes of action raised by the pleadings, including the defenses and counterclaim within the Answer, and by the trial. This approach is also consistent with that which was taken by the parties in their post-trial memoranda, wherein each argues for judgment in their favor as to all counts.

DISCUSSION

COUNT 1 (Declaratory Judgment re Deadline for New Financing

By this first cause of action, the Plaintiffs seek a judgment declaring that the July 2nd Agreement did not require them to obtain refinancing for the joint venture(s) by December 15, 1999 and that they continue to have a reasonable amount of time t0 obtain such refinancing. They alternatively contend that, in the event that the Court determines that such a deadline exists, the failure to meet that deadline should be found to be the result of the Defendants' wrongful acts. *See* Complaint ¶¶167-175.

Upon a review of the evidence at trial, the Court concludes that Plaintiffs have failed to prove, by a preponderance of the evidence, that judgment should be rendered in their favor with respect to the first cause of action. The reasons are as follows:

First, the provisions of the July 2nd Agreement clearly present "December 15, 1999" as a deadline. Paragraph 1.4 is quite specific in providing that "Leucadia will agree not to exercise any of the rights or remedies under the Cargill Loans, including prosecution of foreclosure actions, pending the Restructure Date, which must occur no later than December 15, 1999." Paragraph 1.4 further recites that "[i]f the Restructure Date has not occurred by December 15, 1999, Leucadia shall be free to exercise any rights or remedies under the Cargill Loans."

The "Restructure Date" is defined in ¶1.3 of the July 2nd Agreement as the "implementation of the restructuring of the ownership of the Properties as contemplated in Section 1.2 of this agreement." Paragraph 1.2 describes the purpose of the Agreement and details the manner in which the parties intended to form "new limited partnership or limited liability company arrangements" known as the "Venture(s)." More specifically, ¶1.2(a) states that the

> Breslin entities would contribute 100% of their interests in the Properties (and the partnerships that own the Properties) (but not the Doyle Court Property) to the Venture(s) in exchange for fifty percent (50%) of the equity interest in the Venture(s) and Leucadia will own fifty percent (50%) of the eq-

> uity interest in the Venture(s). The parties will proceed to establish the Venturers [sic] and make such contributions as promptly as possible. The material terms and conditions of the Ventures will be consistent with the terms and conditions of this agreement.

Paragraph 1.2(b) then states that "Leucadia and the Breslin Entities will obtain through the Venture(s) new cross collateralized first mortgage loans (the "First Loan") with respect to certain of the Properties in the approximate aggregate amount of $34 million."

Paragraph 13 of the July 2nd "Agreement is quite specific in announcing that" [t]ime is of the essence of this agreement." That paragraph also declares, plainly and clearly, that the July 2nd Agreement

> represents the entire agreement between the parties hereto with respect to the subject matter hereof and supersedes all prior oral and written agreements and commitments. *This agreement is not a joint venture agreement and no joint venture, partnership or similar relationships shall exist between Leucadia and the Breslin Entities until the Ventures are formed, the Properties are contributed to the Ventures, and the indebtedness under the Cargill Loans has been restructured.* (Emphasis added)

Consistent with the Court's finding that the July 2nd Agreement is an integrated contract that is not ambiguous, the analysis must begin with the agreement itself. Paragraph

13 is precise and clear: no joint venture was created by the parties merely because they signed the July 2nd "Agreement. Rather, the parties agreed that "no joint venture, partnership or similar relationship" was to come into existence as and between Leucadia and the Breslin Entities "until the Ventures [were] formed, the Properties [were] contributed to the Ventures, and the indebtedness under the Cargill Loans [was] restructured." *See* ¶13. The parties further agreed that the "restructuring and refinancing of the Properties" was to be undertaken in the manner described in Paragraph 1.2 of the July 2nd Agreement. That manner, as noted above, included the contribution by the Breslin Entities of "100% of their interests in the Properties ... to the Venture(s) in exchange for fifty percent (50%) of the equity interest in the Venture(s)." *See* ¶1.2(a). Moreover, the establishment of the Venture(s) and the making of such contributions were to "be consistent with the terms and conditions of this agreement." *Id.*

By these words and provisions, the parties could not have been more clear in saying that there would be no joint venture until (i) they formed the new entity by drafting and thereafter executing the documents by which the new entity was to be created, (ii) they restructured the Cargill Loans by procuring new funding or financing for the new entity, and (iii) they contributed whichever Properties were appropriate to be contributed to the new entity, to serve as the cross collateral for the new first mortgage loans. The July 2nd Agreement did not require the parties to procure one single first mortgage loan, secured by all the Properties; nor did it limit the parties to the formation of one single joint venture. Rather, the Agreement gave the parties a great deal of lati-

tude within which to establish as many ventures as were required. Similarly, there could be as many first mortgages as were required, so long as the aggregate totaled approximately $34 million. In like manner, the parties could choose which Properties were to be contributed to which new entity, depending upon the nature of the new financing that was to be procured. *See, e.g.,* Argument of Plaintiffs' Counsel, Hearing of July 13, 2000, Tr. at 14-16. Sophisticated businessmen that they were, the parties clearly contemplated that the $34 million new financing might consist of more than one funding source and thus more than one new entity might be required to be formed. The Properties to be contributed to anyone new entity could have been dependent, for example, upon which were required by the potential lender. [6]

Within this context, it is reasonable that the parties defined the "Restructure Date" as the "implementation of the restructuring of the ownership of the Properties as contemplated in Section 1.2 of this agreement." *See* ¶1.3. The parties were quite cognizant that the Cargill Loans, which were contemplated to be restructured, did not consist of a single loan or agreement. Rather, as the Estoppel Certificate (Def. Trial

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[6] Illustrative of these possibilities is that Plaintiffs announced during the trial that they have obtained commitments from (i) Independence Bank in the amount of $7.5 million for the Huntington Square Property, and $17 million for the Bay Harbour Property (Trial Tr. at 518), and (ii) GMAC in the amount of $ 3.285 million for the Riverwood La Place Property (Trial Tr. at 529). Given that these scenarios are based upon different properties serving as the underlying collateral for each first mortgage loan, one could envision the parties deciding to form three separate ventures, which would have been permissible under the scheme envisioned in the July 2nd Agreement.

Exh. 5) iltrates, it took more than 18 pages of single-spaced typing to simply describe the title of each of the Cargill Loans at issue. The parties were equally aware that "restructuring of the ownership of the Properties as contemplated in Section 1.2" could have taken any one of a variety of forms, including the formation of one or more new entities. Thus, the parties defined the "Restructure Date" as an event, namely, the point in time when the restructuring of the ownership of the Properties was implemented. When read in connection with Paragraph 13, this point in time existed when the "joint venture, partnership or similar relationship" arose between the parties: *i.e.,* that point in time when "the Ventures [were] formed, the Properties [were] contributed to the Ventures, and the indebtedness under the Cargill Loans [was] restructured." *See* ¶1.3.

Returning, then, to the provisions of Paragraph 1.4, the July 2nd Agreement is clear in its recital that the "Restructure Date" "must occur no later than December 15, 1999." Because, as noted above, the Restructure Date is defined as an event (¶1.2) and because that event includes the restructuring of the indebtedness under the Cargill Loans (¶1.3), the Court concludes that the July 2nd Agreement required the parties to obtain refinancing or new funding for the joint venture(s) prior to December 15, 1999, failing which Leucadia became "free to exercise any rights or remedies under the Cargill Loans." *See* ¶1.4.

In addition to the terms of the July 2nd Agreement, the Court finds that the parties, including the Plaintiffs, understood that the December 15, 1999 date was a deadline by which new financing had to be obtained and that their ac-

tions were consistent with that understanding.[7] For example, at the hearing on July 7, 1999 at which the Plaintiffs requested approval of the July 2nd Agreement, their counsel stated the following:

> [Pl. Counsel]: I think the first term of the [July 2nd] agreement is that Leucadia will purchase the claims of CFSC [*i.e.,* Cargill] for 49 million dollars, 47-and-a-half million dollars will be paid to CFSC at the closing, and 1.5 million dollars will be paid to Wilbur Breslin, who had initially paid 1.5 million dollars to CFSC in February of this year. ...
>
> Leucadia will agree not to exercise any of the rights or remedies under the Cargill loans until December 15, 1999. Obviously, this is a tremendous advantage over the present agreement which terminates on the 16th [of July, 1999], and it will provide the window of opportunity for the putting into place the long-term financing which will provide the basis for the debtor's reorganization.

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[7] Plaintiffs argue that all extrinsic evidence concerning the July 2nd Agreement is barred as a result of the Court's ruling that the parol evidence rule applies. The Court disagrees to the extent that the extrinsic evidence is *subsequent to* the making of the Agreement. Admissions made by a party *after* an agreement has been signed which are consistent with the terms of the agreement are not barred by the parol evidence rule. *See, e.g., Nationwide Mutual Insurance Co. V. Erie and Niagara Insurance Ass'n,* 249 A.D.2d 898, 672 N.Y.S.2d 596 (4" Dep't 1998).

Def. Trial Exh. 53 (July 7, 1999 Tr.) at 5-6. Later in that same hearing, there was the following exchange between Plaintiffs' counsel and Leucadia's counsel:

> [Leucadia's counsel]: Your Honor, the purpose of the negotiations [sic] have been ongoing for quite some time, to make sure that the responsibilities of each party are set forth. We will fulfill our obligations. We anticipate that the debtor will fulfill his. If the debtor can't meet its deadlines then, certainly, we will comply and take advantage of whatever rights we have under the agreement. But if the debtor comes up with the alternate financing in a timely way, ... we are voting in favor of this.
>
> [Plaintiffs' counsel]: Your Honor, this agreement is a substitution for the CFSC agreement.

Id., Tr. at 11.

Only a few weeks after the Court approved the July 2nd Agreement, the Plaintiffs, together with Leucadia, presented a signed stipulation regarding the use of Leucadia's cash collateral. *See* Def. Trial Exh. 50. By that stipulation, approved by the Court on August 4, 1999, the parties agreed as follows:

> 8.a. The Joint Debtors [Plaintiffs] represent that Luk-Shop holds an allowed claim of $92.0 million against the Joint Debtors, which debt is secured by all of the real properties, and. all of the personal property (including fixtures, leases, and rental income attendant to the realty) of the Joint Debtors.

> All income received by the Joint Debtors constitutes Leucadia's cash collateral, as that term is used in Bankruptcy Code section 363.
>
> ...
>
> 8.f. [B]ecause Luk-Shop's mortgages and liens were cross-collateralized and cross-defaulted pre-petition, the post-petition security interests granted under the cash collateral order are cross-collateralized and cross-defaulted to the same extent as the pre-petition claims.
>
> 8.n. The cash collateral order shall expire on the earlier of (a) December 15, 1999, (b) the default by one or more of the Joint Debtors to fulfill the obligations imposed on it or them by the July 7 Order, or (c) the effective date of reorganization plane(s) for the last of the Joint Debtors to emerge from bankruptcy. Provided, however, that upon the expiration of the cash collateral order pursuant to subparagraphs (a) or (b) above, the automatic stay is immediately modified to allow Luk-Shop to pursue any and all remedies available to it, without further order of this Court.

Id. at 4, 6 and 9. Once again, the parties' statements within the cash collateral stipulation are consistent with an understanding that December 15, 1999 was a critical deadline.

Moreover, in presenting the Amended Joint Disclosure Statement for the proposed reorganization for Busy Bee,

V&J, and Doyle, the Plaintiffs made the following statements:

> "Leucadia agreed to forebear in the State Court foreclosure proceedings until December 15, 1999." (Def. Trial Exh. 15B, at 8);
>
> "Leucadia, the Debtors and their affiliates diligently attempted to locate a lender willing to lend up to 34 million dollars, (the balance due to take-out Leucadia after crediting the payment of $11.8 million received from the sale of Busy Bee, discussed infra) before the December 15, 1999 deadline." *(Id.* at 8-9)

In addition to documents filed with the Court, there were other documents prepared by the parties wherein they also referred to the December 15, 1999 deadline as one by which new financing had to be obtained. *See, e.g.,* Def. Trial Exh. 37 (the GECC loan application signed by the parties on or about October 8, 1999, provides on page 4 that the closing is to take place "on or before December 15, 1999"); and Def. Trial Exh. 47 (the time records of Plaintiffs' counsel, submitted in connection with their fee application, are replete with references to the "December 15, 1999 deadline" in the December 1999 time period). By letter dated December 14, 1999, Wilbur Breslin wrote to Leucadia that he was "hoping that can agree to *an extension of time* for Luk Shop Inc: and Breslin Entities to obtain the refinancing necessary to complete the restructuring contemplated by the Agreement without the necessity of a foreclosure." Def. Trial Exh. 17 (emphasis added). Presumably a request for an "extension of

time" would not be necessary if the Plaintiffs believed that which they now argue, namely, that there was no deadline by which refinancing had to be obtained.

Further, the testimony of Messrs. Schackner, Breslin and Hershfield is also consistent with the parties' understanding that the December 15, 1999 date represented a deadline by which refinancing had to be obtained.[8] *See* Trial Tr. at 196-98 (Hershfield testified with respect to a pre- December 15th dinner meeting with Messrs. Breslin and Myles where the subject of the need for an extension of time was discussed); Trial Tr. at 199 (Hershfield testified with respect to a conversation with Schackner concerning the subject of an extension of time); Trial Tr. at 200-202 (Hershfield testified with respect to conversations with Breslin and others after the December 15th deadline); and Trial Tr. at 586-89 (Schackner testified with respect to the conversations with Hershfield before the December 15th deadline concerning a request for an extension of time). As Mr. Schackner, the Chief Financial Officer of the Breslin Entities, testified:

> Q. Do you recall having conversations with Mr. Hershfield in approximately the first two weeks of December about whether Leucadia would be extending the December 15, 1999 deadline?
>
> A. I remember conversations, yes.

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[8] The Court found the testimony of Messrs. Hershfield and Schackner to be particularly credible.

Q. Do you recall having discussions with Mr. Breslin in December 1999, prior to December 15, about getting an extension of that deadline?

A. Yes.

A. I spoke to Mr. Hershfield about the deadline. I couldn't say today that it was necessarily in the form of a request. I know Mr. Breslin spoke to Mr. Hershfield about it.

Q. How do you know that?

A. Because he told me.

Q. What did he tell you?

A. That he was calling Mr. Hershfield to talk about extending the date for reorganizing the properties for December 15th.

Q. Did he tell you the reason he was calling Mr. Hershfield to do that was that the new mortgage financing wouldn't be in place by December 15, 1999

A. The concern was that if we reorganized the properties without having the properties financed, in which case Leucadia would be a lender and an equity player, there would be potentially severe income tax consequences to Mr. Breslin, Mr. Easa and Mr. Pecunies.

Q. Were you aware of that concern in the fall of 1999, that tax concern?

A. Yes.

Q. Were you aware that from the Breslin entity or Breslin partner point of view that what needed to be done to avoid those unfavorable tax consequences was to have Leucadia taken out as a lender and then put the properties into the venture?

A. Yes.

Q. So that was the sequence that was contemplated; correct?

A. That would have been the most favorable sequence. Not necessarily the only one, but the most favorable one.

Q. That would have involved a simultaneous closing with the lender standing by with a firm commitment, forming the ventures, taking Leucadia out and deeding the properties into the ventures; correct?

A. Yes.

Trial Tr. at 588-89.

When the Court reviews the evidentiary record the testimony of the witnesses; the contemporaneous actions of the parties at the time of the events at issue; their statements at relevant times, both before and after the December 15, 1999 deadline; and the documents drafted by the parties during this period - the scale is heavily tipped in favor of a ruling adverse to the Plaintiffs on the first count. The preponderance of the evidence is that, by their July 2nd Agreement, the parties agreed, *inter alia,* that financing for the ventures had to be obtained by the December 15, 1999 deadline, failing

which Leucadia became free to exercise any rights or remedies under the Cargill Loans. The Court further finds that the parties understood this to be the agreement at all times contemporaneous with the events and that it was not until the advent of this adversary proceeding that the Plaintiffs shifted their position and asserted a contrary understanding.

To the extent that the Plaintiffs also allege, in the first count, that Defendants' actions interfered with or impeded their ability to procure financing by the December 15, 1999 deadline, the Court disagrees. *See* discussion *infra* with respect to the remaining counts. Lastly, the Court also rejects that Plaintiffs' closing argument that they should be relieved of any obligation with respect to the December 15, 1999 deadline because the Defendants never demanded a closing on or about that date. The law of the State of New York is clearly established that where a condition to closing cannot be met at the time required, the parties are not required to go through the futility of noticing and attending a "closing" at which both parties recognize that nothing useful will occur. *In re Rodolitz Holding Corp. v. Bel Canto Fancy Foods Ltd.*, 232 B.R. 573, 578 (E.D.N.Y. 1999); *King World Products v. Financial News Network*, 660 F. Supp. 1381, 1386 (S.D.N.Y. 1987); *Petrazzulo v. Lowen*, 534 F. Supp. 173, 176 (S.D.N.Y. 1982) ("The law does not compel [parties] to perform a futile act"); *Sunshine Steak Salad & Seafood Inc., v. WIM Realty. Inc.*, 135 A.D.2d 891, 892, 522 N.Y.S.2d 292, 293 (3rd Dep't 1987) ("where it becomes clear that one party will not live up to a contract, the aggrieved party is relieved form the performance of futile acts or conditions precedent"). Here, no one had any doubt that no new financing or refinancing had been obtained prior to December 15,

1999. Thus, it would have clearly been a futile act for Leucadia to have noticed a closing at which nothing was to be accomplished.

In sum, the Court concludes that judgment should be entered declaring that, pursuant to the July 2nd Agreement, December 15, 1999 was a firm contractual deadline by which new *first* mortgage financing had to be obtained in furtherance of the restructuring contemplated by that agreement. The Plaintiffs have failed to prove an essential element of their claim by a preponderance of the evidence, and Defendants are entitled to judgment in their favor.

COUNT 2 (Breach of Fiduciary Duty and Existence of a Joint Venture!

The parties do not dispute the law: in order for the Plaintiffs to prevail on their breach of fiduciary duty claim, they must, as a threshold matter, establish that a fiduciary duty existed between the parties. It is black-letter law that a mere commercial transaction involving an arm's length contract negotiated between two sophisticated parties with relatively equal bargaining power does not, in and of itself, create a fiduciary relationship. In contrast, the existence of a joint venture would create a fiduciary relationship between the parties and a fiduciary duty would arise. By their allegations, the Plaintiffs urge that, notwithstanding the provisions of ¶13 in the agreement, a joint venture arose immediately upon the execution of the July 2nd Agreement or by the conduct of the parties shortly thereafter.

Black's Law Dictionary, together with the cases cited by the Debtors in their post trial memorandum, define a joint venture as

> a legal entity in the nature of a partnership engaged in the joint undertaking of a particular transaction for mutual profit. An association of persons or companies jointly undertaking some commercial enterprise; generally all contribute assets and share risks. It requires a community of interest in the performance of the subject matter, a right to direct and govern the policy in connection therewith, and duty, which may be altered by agreement, to share both in profit and losses.

(citations omitted). The rule that a mere contract does not create a fiduciary relationship (or, in this case, a joint venture) is particularly applicable where the parties expressly state in their written agreement that the agreement does not give rise to such a relationship, and where they specify the conditions necessary before such a relationship was to be formed. The parties here have done so:

Paragraph 13 of the July 2nd Agreement could not be more clear. Paragraph 13 specifically states that:

> This agreement is not a joint venture agreement and no joint venture, partnership or similar relationships shall exist between Leucadia and the Breslin Entities until the Ventures are formed, the Properties are contributed to the Ventures, and the

indebtedness under the Cargill Loans has been restructured.

Nevertheless, by their second cause of action, Plaintiffs seek an award of compensatory and punitive damages for an alleged breach of fiduciary duty owed to them by the Defendants. The factual allegations in the Complaint assert that by virtue of the following events, the Ventures, notwithstanding the clear mandate of ¶13, in fact came into existence: -

> Leucadia participated in the management of the Properties (the same being required by ¶¶5 and 6 of the Agreement);
>
> Leucadia gave its approval and authorization of expenditures for ground rent, advertising expenses, management fees, debt service payments, vendor, construction & tenant build-out expenses and real estate commissions (the same being required by ¶5 of the Agreement);
>
> Leucadia submitted joint applications, along with the Plaintiffs, in order to procure Refinance Mortgage Loans as contemplated by the agreement;
>
> Leucadia recommended approval and rejection of certain proposed leases for the Properties;
>
> Leucadia received interest payments on its loan (which is consistent with ¶¶1.2, 1.3, 2.2 and 3.1 of the Agreement);
>
> Leucadia received management fees in connection with the management of the Properties;

> Leucadia shared in the profits and losses generated by the Properties;
>
> Leucadia and the Plaintiffs paid the commission to Glenn Myles prior to the formation of the Venture(s); and
>
> Leucadia bid for the Service Merchandise leases and used the services of Mr. Vintsent, an employee of the Plaintiffs, as its agent in the bidding process.

The complaint further alleges that Leucadia acted at all times in a manner consistent with its status as a joint venture partner and therefore, it was in fact a joint venture partner with the Plaintiffs. For this reason, the complaint alleges that Leucadia owed Plaintiffs a fiduciary duty of loyalty and a duty to refrain from self-dealing, and that it breached those duties by "willfully delaying and refusing to sign the Refinance Applications ... [and] obstructing Plaintiffs' diligent efforts to obtain Refinance Mortgage Loans." It further alleges that Leucadia was implementing a plan to appropriate for its sole enjoyment the benefits of the ownership and operation of the Properties, to the detriment and exclusion of the Plaintiffs, in breach of its fiduciary obligations. Plaintiffs also allege that by filing a liquidating plan inconsistent with the Agreement, the Defendants are furthering a scheme to deprive the Plaintiffs of their interests in the Venture(s) and the Properties.

First, at the outset, the Court disagrees with Leucadia's position that Count two must be dismissed as a matter of law pursuant to the parol evidence rule and this Court's prior ruling with respect to same. Leucadia asserts that the Debtors

are "precluded from introducing extrinsic evidence to establish the existence of a joint venture because such evidence directly contradicts the express terms of the July 2 Agreement. ... "[P]laintiffs' proof concerning the purported *de facto* creation of a joint venture should not be considered by the Court and the cause of action for breach of fiduciary duty based on such purported joint venture should be dismissed." Def's Post-Trial Mem., at 16. The parol evidence rule requires exclusion of extrinsic evidence made *prior to or contemporaneous with* a written contract. *United States Fire Ins. Co. v. General Reinsurance Co.*, 949 F.2d 569, 571 (2d Cir. 1991). The evidence introduced at trial was of conduct which occurred *subsequent* to the Agreement which the Plaintiffs contend show the existence of .a joint venture. The evidence was therefore properly admissible and may be considered by the Court.

Turning to the provisions of the July 2nd Agreement, ¶1.4 provides, insofar as is relevant here, that "from the Closing Date and until the Restructure Date, the Properties will be managed in the manner contemplated in Section 5 of this agreement." Paragraph 5 provides that

> Day to day management of the Properties in the Venture(s) shall be by the Breslin Entities, subject to normal operating performance criteria (such as a mutually agreeable annual business plan) acceptable to Leucadia. A representative of Leucadia shall be part of the management team and work with the Breslin Entities with respect to management of the Properties. Management of the Properties and the Venture(s) shall allow and the

> Properties shall bear a management fee of five percent (5%) of revenues, allocable and payable three and one-half percent (3½%) to the Breslin entities and one and one-half percent (1½%) to Leucadia. Management fees will be subordinated to debt service on the First Loan and payment of interest on the Second Loans. Counsel for the Ventures shall be chosen jointly by Leucadia and the Breslin Entities. ...

The Plaintiffs argue that the parties' conduct created a joint venture, and refer to the following as evidence: Plaintiffs point to evidence which shows that Leucadia received a monthly "management fee" of 1.5% of gross rents after the July 2nd Agreement, and argue that such fees are not authorized under either the Cargill Loan documents or the cash collateral order entered by the Court but are authorized solely under ¶5 of the Agreement. That paragraph, as noted above, provides that day-to-day "management of the Properties *in the Ventures* shall be by the Breslin entities, and that Management of the Properties *and the Venturer(s)* shall allow and the Properties shall bear" the fee (emphasis added). Therefore, the Plaintiffs argue that the only reasonable conclusion is that payment of the management fees to Leucadia evidences the existence of the joint venture.

The Court disagrees. Paragraph 1.4 of the Agreement clearly provides that from July 8, 1999 until the "Restructure Date," the properties will be managed in the manner contemplated by ¶5. Therefore, receipt of management fees by Leucadia prior to formation of the ventures was contemplated by, and wholly consistent with, the July 2nd Agree-

ment and is insufficient evidence to overcome the clear meaning of ¶13.

For the same reason, the Court also believes that what Plaintiffs categorize as "Defendants' Conduct With Respect to Section 5 of the Agreement" *(see* Plaintiff's Post-Trial Mem., at 40) is insufficient to support a finding that a joint venture was created by the parties upon their signing of the July 2nd Agreement. Plaintiffs introduced a variety of documents to establish that Leucadia authorized, approved and executed checks for expenditures respecting the properties for such things as rents, advertising expenses, construction expenses, utilities, and other expenses incidental to the ownership and management of the properties. *See, e.g.,* Trial Exh. 57 (approving roof repair at one property), Trial Exh. 62 (signing checks for electric bills). Again, however, it is a reasonable explanation that these items fall within the "day to day" management language of ¶5, and, as noted, ¶1.4 provides that pending the Restructure Date, the properties were to be managed by the Breslin Entities, subject to normal operating performance criteria acceptable to Leucadia. In addition, Paragraph 5 provides that a representative of Leucadia "shall be part of the management team and work with the Breslin Entities with respect to management of the Properties."

Paragraph 13 provides that the joint venture is not created until the "Ventures are formed, the Properties are contributed to the Ventures, and the indebtedness under the Cargill Loans has been restructured." It is undisputed that the Properties have not, to date, been "contributed to" the Venture(s); nor is it disputed that the indebtedness under the Cargill

Loans has not, to date, been restructured. A reasonable inference that arises from the July 2nd Agreement is that the parties recognized, in Paragraphs 1.4 and 5, that the events contemplated therein would not occur overnight, and they therefore established a mechanism by which the Properties would be managed until they did. That the Plaintiffs managed the Properties, and Leucadia cooperated with them *as they were required to* pursuant to the parties' obligations under ¶¶1.4 and 5, is insufficient evidence that both parties were nonetheless somehow evidencing an intent to create a joint venture *at that time.* Indeed, in view of the testimony of Plaintiffs' CFO, Martin Schackner, concerning the potential adverse tax implications that might fall upon the Breslin Entities if the joint venture were created prior to new financing being obtained to avoid Leucadia participating as both a lender and equity partner *(see* discussion *supra* at 30-32; Trial Tr. at 58889), it appears that both parties - including the Plaintiffs - wanted to be clear that no joint venture or similar relationship was to arise until the conditions set forth in Paragraph 13 were satisfied.

Another argument advanced by the Plaintiffs relates to certain documents titled "Breslin Leucadia Venture Management Report" for the months of July, 1999 through January, 2000. *See* Pl. Exhs. 50-56. Mr. Hornstein testified that the Breslin Entities prepared, and Leucadia received these reports on a monthly basis. From this, the Plaintiffs argue that the reports "are of the type typically sent to equity holders or partners, not to lenders, and are not required under the Cargill Loan documents. At no time have Defendants objected. ..."

Plaintiffs' argument fails for several reasons. First, there was no testimony that Leucadia ever requested such reports, or that it relied upon them in any way. In fact, the sole testimony relating to these reports is that they were prepared and distributed, from time to time, to Leucadia. The fact that the Breslin organization prepared such reports, apparently unsolicited, and unilaterally titled them the "Breslin Leucadia Venture Management Report," is insufficient evidence upon which the Court can conclude that a joint venture existed. It is even more plainly insufficient when viewed against the clear provisions of Paragraph 13 of the July 2nd Agreement.

Paragraph 6 of the July 2nd Agreement refers to matters "not included within day-to-day management activity" with respect to the properties and is titled "Governance." That section provides, in part, as follows:

> All matters not included within day to day management activity, including without limitation, financings or refinancings, property sales or acquisitions, construction contracts, material leases (covering 25,000 square feet of space or more) and the like ("Significant Matters") shall require approval of a majority of the equity or ownership interest in the Venture(s).

Based upon this paragraph, the Plaintiffs contend that ¶6 only grants the right of approval of significant matters to the Ventures, and that because Leucadia at times subsequent to July 2, 1999 exercised such approvals, a joint venture was created by Leucadia's conduct.

The Court disagrees and believes that the evidence is not as clear as the Plaintiffs contend. Plaintiffs point to Leucadia's conduct at a time when the Breslin parties were entertaining a lease with a potential tenant known as "A&E." Mr. Breslin testified that in approximately September, 1999, he had a conversation with Lawrence Hershfield and, perhaps, Mark Hornstein of Leucadia. In that conversation, Breslin testified that Hershfield told him that Leucadia had had prior dealings with A&E, that their experience with A&E had been negative, that litigation was commenced, and that Leucadia "preferred that I do not accept this tenant." Trial Tr. at 646. As a result, Breslin did not accept the tenant. Hershfield also testified that he told Breslin that "you shouldn't put this guy in the mall. He doesn't pay his bills. It was just good business." Trial Tr. at 122. Contrary to the Plaintiffs' urging, the Court does not believe that a comment, shared among businessmen, about a prospective tenant's bad bill-paying history can be construed as an act which creates a fiduciary relationship between the parties in this case.

The other evidence to which the Plaintiffs point is testimony by Breslin that he had discussions with Hershfield about several potential lessees (including, *e.g.*, CVS, Waldbaums and Burlington Coat Factory) and that all Hershfield cared about was the status of the leases -- *i.e.*, when were the leases going to be consummated. Trial Tr. at 646-48. The Plaintiffs also refer to Pl. Exh. 94, which is simply a letter from Breslin to Hornstein at Leucadia, recommending approval of the execution of a lease with Peter Harris Clothing. Upon review, the Court does not believe that Breslin's testimony and/or Exh. 94 is sufficient to show, by a preponderance of the evidence, that Leucadia exercised "approval

rights" under ¶6 and that, by having done so, the Court must conclude that a fiduciary relationship arose as and between the parties from this event. Indeed, upon further review of the draft lease (annexed as an exhibit to Pl. Exh. 94), the proposed lease only provides for signatures by *Breslin,* and not by anyone at Leucadia.

The next set of factors to which Plaintiffs point concerns ¶12 of the July 2nd Agreement. Paragraph 12 states, in pertinent part, that "after closing the Ventures shall pay a fee in the aggregate amount of $500,000 to Gleun Myles for brokerage and finders services." At trial, the Plaintiffs introduced uncontroverted testimony that Myles was, in fact paid --Leucadia paid $250,000, and the Breslin Entities paid the other $250,000. Plaintiffs therefore argue that "Section 12 of the Agreement and the $500,000 payment to Glenn Myles by LUK-SHOP and BRDC, on behalf of 'the Ventures,' constitute an express and unambiguous recognition that the Agreement was intended to create, and in fact created, the parties' joint venture." *See* Pl. Post Trial Mem. at 38.

For the following reasons, the Court does not conclude that the payment to Glen Myles establishes a joint venture. First, Hershfield testified that the "ventures" did not pay Myles. Rather, "Leucadia agreed with the Breslin Entities that we would pay him apart from this, outside of this agreement, in lieu of this." Myles had apparently been instrumental in bringing about the relationship between Leucadia and the Breslin entities. Trial Tr. at 66. His services, which led to the July 2nd Agreement, in fact closed with the consummation of the July 2nd Agreement and its approval by this Court. A few weeks after the agreement closed, Myles

wanted to be paid for his services; Hershfieid spoke with Breslin, who did not "particularly disagree "with paying him; and so, the parties agreed to pay him. Trial Tr. at 66-68. Breslin himself testified that Myles was paid because Hershfield called him and said they should each issue checks for $250,000. Breslin also testified that upon being told that Hershfield wanted to pay Myles, that he agreed to do it, and that he simply wanted to know when he, Breslin, would "get the money back." Trial Tr. at 641, 642. That Breslin anticipated getting the money back shows that he issued the check not as in his capacity as joint venturer, but in a personal capacity, and expected later repayment from the Ventures. In other words, Breslin's own actions support a finding that he was fully aware that it was not the *Venture* paying Myles; rather, it was one of the Breslin Entities - and he expected to be repaid.

In addition, the Court must look to the agreement itself. The July 2nd Agreement, when read as a whole, clearly contemplates how each of the parties were to perform after the July 8, 1999 closing date. It sets forth each parties' rights and obligations, and provides that no joint venture was to be formed until certain conditions exist. It is undisputed that those conditions were never met. The draft operating agreements for the joint ventures have not been signed. The Properties are still owned as they were on July 2, 1999 -- they have not been contributed to *anything*. The indebtedness under the Cargill Loans has not been restructured.

The July 2nd Agreement provides that, pending the implementation of the restructuring and the acquisition of the new financing, interest was to accrue on the $49 million that

Leucadia paid to Cargill. *See* ¶1.3. It further provides that the "accrued interest shall be the responsibility of the Ventures." The Plaintiffs introduced uncontradicted evidence that Leucadia was, in fact, paid such interest. Therefore, the Plaintiffs argue that since the Agreement says that the interest shall be the responsibility of the Ventures, and since it was paid, that the Ventures must therefore have been in existence.

Once again, the Court disagrees. The July 2nd Agreement simply states that the interest "will be the responsibility of" the Ventures. It does not say that the interest may *only* be paid by the Ventures. Nor does it foreclose the possibility that some other entity may pay the interest, and then assert a claim against the Ventures, when formed, for reimbursement. The Court believes, based upon the evidence and the terms of the Agreement, that the latter is what happened here.

The other arguments advanced by the Plaintiffs fare no better. Indeed, to a certain extent, the Plaintiffs erode their own assertions by urging inconsistent positions.[9] More specifically, as part of their contention that a joint venture was created, Plaintiffs assert that Leucadia took "numerous actions consistent with the Ventures having been formed ... including ... applying jointly with Plaintiffs for new refinance loans." *See* Pl. Post Trial Mem. at 43. On but the next page

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[9] The Court recognizes that advocates frequently proffer inconsistent but alternative legal theories as part of their cases. It is much more unusual for a party, however, to advance inconsistent factual positions that are fatal to their own contentions.

of their brief, however, the Plaintiffs argue that Leucadia breached its fiduciary duty by failing "to exercise diligent efforts to obtain the First Loan ... and, instead, did utterly nothing after GECC terminated loan negotiations." *See* Pl. Post-Trial Mem. at 44.

Lastly, the Plaintiffs point to the parties' conduct with respect to two leases to evince the existence of the joint venture, notwithstanding the fact that none of the express conditions for the creation of a joint venture set forth in ¶13 had occurred. Specifically, they refer to Service Merchandise ("SM") which leased space in two of the Properties. SM itself filed for bankruptcy (in another court) and, as part of those proceedings, an auction sale of the leases was held. The Plaintiffs argue that the parties acted as if they were joint venturers by agreeing to bid and then bidding on the two leases. In particular, Plaintiffs assert that (i) the parties combined their efforts in bidding, (ii) they mutually decided to bid, (iii) Leucadia used the services of a Breslin employee (Donald Vintsent) as its agent at the actual bidding, (iv) Vintsent signed the lease assignment as an authorized agent of Leucadia with respect to the lease it successfully bid upon, (v) Leucadia and Breslin shared the cost of the lease by doing an offset of the cure amounts, and (vi) under the lease, Leucadia has not paid any rent, taxes, CAM charges, and has not assigned its interest in the lease to the ventures.

Even assuming *arguendo* that all of this conduct renders the parties joint venturers (which the Court does not believe it does), it would, at most, render them joint venturers *as to the two leases.* It stretches the imagination to conclude that a joint venture arose by these acts with respect to the entirety

of the transaction contemplated by the July 2nd Agreement. Moreover, this conclusion is not supported by the trial record. At trial, Hershfield testified that Breslin suggested that Leucadia bid on the leases, and that the issue arose prior to execution of the July 2nd Agreement. Trial Tr. at 254. They decided to bid on the leases because, as Hershfield stated:

> irrespective of - that those leases were an attractive opportunity in that the rent under those leases we thought was below market and if they could be acquired at an attractive price that space to be released at a higher price, and it made sense for those to be acquired as part of the ultimate, overall transaction.

Trial Tr. at 254. According to Hershfield, Donald Vintsent attended the bidding because "it was a live auction and in order to be able to react to the live auction we needed someone who could call, tell us what is happening, and we would make a decision as to whether we should bid more. ..." Vintsent was chosen because "Breslin offered to send him. It didn't make much of a difference who the physical person who went was." Trial Tr. at 256. According to Hershfield, and this testimony was not controverted, Vintsent had no discretionary authority from Leucadia with respect to the bidding-process -- he was essentially given a maximum price to bid, with instructions to call if the bidding went higher. Trial Tr. at 256.

Hershfield also testified that in the last few months, he and Breslin have agreed to terminate the lease and that termination "would be the right thing to do irrespective of whether

we end up owning all the property or whether the property ends up in a joint venture. That is an operating decision at the level of the property, that it makes sense to, irrespective of what happens in this case, it makes sense to increase the value of that property by getting more rent for that space if we can." Trial Tr. at 279. The Court agrees that businessmen are permitted to make business decisions that make sense, and that, having done so, there is no inference that necessarily arises that a joint venture as and between them was thus created. Simply stated, the Court does not find that Leucadia created a joint venture by agreeing with the Breslin entities to take advantage of a business opportunity. This is all the more clear when juxtaposed against the plain words of ¶13 of the July 2nd Agreement.

In summary, the Court finds that a joint venture was not created by the parties' conduct. Paragraph 13 of the July 2nd Agreement is clear; concededly, none of the conditions for the formation of a joint venture has occurred. The Plaintiffs have not shown, by a preponderance of the evidence, that a joint venture came into existence. They have not, as a consequence, established that a fiduciary duty is owed by Leucadia to them. Accordingly, the Plaintiffs have not met the threshold requirement for establishing a breach of fiduciary duty claim, and the Court accordingly directs judgment in favor of Leucadia on the second cause of action. Even if the Court were to conclude that the parties stood as fiduciaries to each other, however, the Court would also conclude that there has been no breach of that duty by Leucadia, for the reasons set forth immediately below.

Count 3 (Breach of the Agreement and Count 4 (Specific Performance)

Insofar as is relevant to Count 3, paragraph 1.2 of the July 2nd Agreement provides that "Leucadia and the Breslin Entities will obtain through the Venture(s) new cross collateralized first mortgage loans (the 'First Loan') with respect to certain of the Properties in the approximate aggregate amount of $34 Million." Paragraph 6 provides, in relevant part, that all "financings or refmancings, property sales or acquisitions ... and the like ("Significant Matters") shall require approval of a majority of the equity or ownership interest in the Venture(s)." The Plaintiffs' third claim for relief seeks damages for breach of the July 2nd Agreement, and their fourth claim seeks a judgment directing Defendants to specifically perform their obligations under ¶1.2(b) and 6 of the July 2nd Agreement and "apply for and obtain the Refinance Mortgage Loans for the Properties. "

The Plaintiffs contend that¶1.2 imposes upon the parties a joint obligation to get new financing, and that Leucadia did not live up to its end of the bargain. In their opening statement, Plaintiffs' counsel argued that the evidence would show that

> as a result of the [Defendants'] predetermined intent before July 2, 1999, that there was a gap of many, many, many weeks between the date that a signature on an application which would give rise to a commitment from GECC from August 12, 1999 to October 7, 1999, a seven-week period, there was a failure by the defendant to sign the

> documents. Had they signed them timely, there is a substantial probability that instead of ultimately GECC, as we will show, refusing to go forward and make the loan, there is a substantial probability that in fact it would have closed.

Trial Tr. at 7-8. Despite counsel's eloquence, the trial record does not support his thesis.

For their part, Defendants assert that they cooperated and acted in good faith throughout the process of seeking financing. Among other things, Hershfield testified that he introduced the Breslin parties to at least two mortgage brokers and several bankers. The Defendants acknowledge that the Breslin parties had the right to decline to pursue those initiatives, but urge that this hardly paints them as the non-cooperating party. Finally, they contend that the decision by GECC to not provide financing cannot be laid upon their shoulders, theorizing that the Breslin parties' lengthy history of litigation as reflected upon Breslin's credit reports was possibly the cause of GECC's decision.

First, the Court notes that the Plaintiffs' complaint of lack of cooperation in obtaining the financing appears to be afterthought -- an argument made after a deal crumbled and the parties are scrambling for strategy. On December 20, 1999, Debtors' bankruptcy counsel filed with this Court, and this Court subsequently approved (with minor revision), a Joint Disclosure Statement Pursuant to Section 1125 of the Bankruptcy Code for Joint Chapter 11 Plan of Reorganization for Busy Bee Associates, L.P., Verleye & Jericho Associates, L.P. and Doyle Realty, L.L.C." (the "Disclosure Statement")

(Defs.' Exhs. 15A and 15B). That document, which is signed by Debtors' counsel pursuant to Fed. R. Bankr. P. 9011, states on page 9:

> Leucadia, the Debtors and their affiliates diligently attempted to locate a lender willing to lend up the 34 million dollars (the balance due to take out Leucadia after crediting the payment of $11.8 million received from the sale of Busy Bee, discussed *infra*) before the December 15, 1999 deadline. In September it appeared General Electric Credit Corporation ("GECC") would act as the lender. However, in the last week of October, GECC announced that it would not complete the transaction.

That statement - written by the Plaintiff-Debtors - is a representation to the Court and the creditors that (i) Leucadia *"diligently attempted" to* locate a lender, willing to lend up to 34 million dollars (ii) *before "the December 15, 1999 deadline."* (emphasis added). Qne cannot avoid the obvious: that both the Disclosure Statement and the present Complaint were written by the same party, the Plaintiffs herein. Despite their effort, the Plaintiffs cannot reconcile two completely conflicting factual scenarios and their attempts to do so are fatal. No matter how the record may be read, it is not possible to reconcile allegations that assert, on one hand in the complaint, that Leucadia had a pre-meditated, sinister plot to default in locating a lender so they could wipe out the Debtors' equity - while saying, on the other hand in the Disclosure Statement, that Leucadia diligently attempted to find a lender. It is equally inconsistent to allege in the complaint that December 15, 1999 was never a deadline at all, but to

write in the Disclosure Statement that both parties tried to find a lender by the December 15, 1999 deadline, to no avail.

Not surprisingly, and perhaps in large part because of the Plaintiffs' inconsistent positions, the trial record does support the Plaintiffs' contentions. Rather, the record reflects the following: Breslin and his personnel had been working with GECC to obtain financing for the properties for months before the July agreement was signed. Trial Tr. at 177. After the agreement was signed, Breslin told Hershfield that while he agreed it "made sense to consider alternative lending sources who might give us better terms ... that in all likelihood we should go with GE because of how much work GE had already done on the properties and because he believed they were most likely to close." Trial Tr. at 178. On August 12, 1999, within a month after signing the July 2nd Agreement, both the Breslin entities and Leucadia executed a GECC term sheet, and over the next three months or so, the parties concentrated their efforts on obtaining the GECC loan.

Nevertheless, shortly after the July 2nd Agreement, Leucadia spoke to four different parties about potential financing. The first was Michael Boxer, of Ramius Capital Group. Trial Tr. at 54. Leucadia had previously done business with Ramius, which apparently has a joint venture relationship with M&T Bank, where "they both participate in loans that are actually originated on M&T's paper but they both fund and they both participate. And Ramius also tries to find lending opportunities for that joint venture." Trial Tr. at 84-84. Hershfield and Boxer had approximately five to ten conversations about the proposed loan, and Hershfield sent a letter

to Boxer describing the proposed deal in general, and suggesting that he get the detailed, specific information on the properties directly from the Breslin organization. Trial Tr. at 84. Ultimately, M&T was unwilling to lend. Trial Tr. at 85.

In July or August of 1999, Hershfield also contacted Lawrence Ackman, the chairman of Ackman-Ziff Realty, a mortgage brokerage company. Trial Tr. at 86. Again, he described the general terms during a phone conversation, and followed up with a letter, arranging to have the Breslin organization send Ackman a package of information. They then spoke again several times and, on least one occasion, there was a conference call with Breslin. Trial Tr. At 88. Ackman made several informal phone calls to potential lenders, but none were interested, and he did not pursue the matter further. He did no further work on the project because his firm, as a matter of course, requires an exclusive agreement to procure financing before seriously attempting to do so. But he and Leucadia had not entered into such an exclusive agreement in this case, and Leucadia and Breslin did not agree to give him one. Trial Tr. at 90.

Breslin agreed, during his testimony, that he did not believe that financing efforts should be pursued with Ackman. As Breslin testified:

> [Breslin]: Mr. Ackman requested that I send him a package, which I did, and subsequently I talked to him, I guess several days or a week later, and he was talking as a reputable broker would and telling me what I already knew in terms of the market. But

> more importantly, that he was just starting out and agreed that it would take him several months to just mobilize to get lenders interested. And we were very far advanced beyond that point.
>
> ... So there was really no sense going forward because we were looking for opportunities that would give us the ability to pay Leucadia back as quickly and promptly as possible.

Trial Tr. at 625-26.

Hershfield also spoke to The Chase Manhattan Bank and Greenwich Capital. Trial Tr. at 91. Because Chase is one of Leucadia's bankers, he spoke to one of the line officers at Chase and again, briefly described the properties to her. Trial Tr. at 93. At the time, the GECC proposal was pending, and Leucadia was essentially trying to determine if better loan terms could be found. Trial Tr. at 94. During his conversation with the Chase banker, Hershfield shared with her the rough terms of the GECC loan, and asked if Chase might be interested. Approximately one week later, Chase called him back to say they were not.

Hershfield also contacted Greenwich Capital and spoke several times with Joe Walsh, with whom he had worked on other transactions. Trial Tr. at 99. Leucadia "finished with these inquiries" sometime in late August or early September. By that date, the parties had decided that "we would go with GE. ..." Trial Tr. at 101. During August, September and October 1999, Leucadia and Breslin negotiated with GECC --

both sides were unhappy with some of the terms of GECC's August 12, 1999 initial proposal (Trial Tr. at 102), notwithstanding that both Leucadia and the Plaintiffs had signed the same, and GECC changed the tenns unfavorably in subsequent proposals. Trial Tr. at 559. After receiving the August 12, 1999 proposal as signed by the Plaintiffs and Defendants, GECC revised its financing proposal by, among other things, raising the interest rate, shortening the term of the loan, providing for higher reserves, and so on. Trial Tr. at 550-60. There were "a number of issues where there was hope for improvement" in the terms of the proposal. Trial Tr. at 102.

Plaintiffs point out that Leucadia was concerned about "what level of recourse Leucadia would have directly, if any, on the loan." Trial Tr. at 103. Yet, Leucadia ultimately agreed to limited recourse under certain circumstances even though, as the Court finds below, they were not obligated to do so. In late September, 1999, there was a lengthy meeting between representatives from Breslin, Leucadia and GECC at Leucadia's offices, in which all three parties went through the GECC proposal line by line and negotiated terms. Trial Tr. at 193, 358. All outstanding issues were resolved, Tr. at 193, and shortly thereafter, GECC issued a term sheet, which both Breslin and Leucadia signed. Trial Tr. at 193, 360; *see also* Pl. Exh. 146.

At no time during this negotiation process did anyone from Breslin complain to Hershfield, or anyone else at Leucadia, that Leucadia was "dragging its feet." Trial Tr. at 184. Rather, the evidence reveals that various drafts of the term sheets were faxed back and forth, with *both* sides - Plaintiffs and Defendants - making comments and suggestions. For its

part, the Breslin side also had concerns about some of GECC's terms. *See, e.g.*, Tr. at 560-62. Both sides testified that the parties had a good working relationship. *See, e.g.*, Trial Tr. at 521. After the negotiation process was concluded, following the meeting at its offices, Leucadia promptly executed the term sheet which incorporated all the changes that had taken place as a result of negotiations between Breslin, Leucadia and GECC. Pl. Exh. 146.

Despite Plaintiffs' urging to the contrary, there is nothing in the record to show anything other than a negotiating process that took place during the time when GECC was considering whether to fund the financing. More specifically, there is nothing to show that the negotiating process was, as Plaintiffs claim, a disguised, willful and conscious effort on Leucadia's part to impede the loan application process. There is, by contrast, evidence to show that it was Breslin who tried to impede Leucadia's efforts to procure financing with any party other than GECC. Trial Tr. at 564-66; *see also* Def.' Exh. 42.

In any event, in late October, GECC informed the parties that it did not intend to go forward with the loan. Trial Tr. at 106. Leucadia did not independently contact anyone else about obtaining financing after that point. Trial Tr. at 101, 106, 110. The Breslin parties, however, contacted several parties: (i) Warburg, Dillon, Reed, (ii) Metlife, and (iii) GMAC. Breslin kept Hershfield appraised of his progress with those potential lenders. The record reflects that Leucadia cooperated with Breslin in applying for the Warburg, Dillon Reed mortgage application and, in fact, signed the application and authorized and signed a check in the amount

of $69,500 for a good faith deposit, on or about December 17, 1999. Trial Tr. at 363; *see also* PI. Exh. 157.

Much was made by the Plaintiffs of the fact that Hershfield may not have had significant experience with commercial lending with respect to shopping centers and, that as a result, he unnecessarily quibbled with GECC over the terms of their proposal. The Plaintiffs tried to imply that Leucadia tried to kill the loan with over-negotiation of insignificant matters. *See, e.g., Trial* Tr. at 152. But the overwhelming fact remains - undisputed - that Leucadia *signed* the application with GECC and there is nothing else in the record that supports a finding that GECC's decision to not fund the financing had anything to do with actions taken by Leucadia. To be sure, Leucadia attempted to obtain the best possible terms through negotiation. This is what sophisticated commercial borrowers try to do and it can hardly be construed to be a breach of a contractual obligation or a breach of a fiduciary duty. Further, there is nothing in the record to support a finding that Leucadia's negotiation requests were unreasonable or that Leucadia, by its words or conduct, killed the GECC loan, Schackner himself admitted that although Hershfield raised several objections to the terms at the meeting in Leucadia's offices, Hershfield did not pursue them for more than a few minutes and certainly not to the point where anyone walked away from the meeting. Trial Tr. at 571. Moreover, as noted, within days of that meeting, upon receiving a revised application, Leucadia promptly signed it, and agreed to the GECC terms, despite its apparent qualms.

Nothing in the record suggests that anything happened other than that GECC simply decided not to extend it. [10]In fact, Breslin conceded at his June 22, 2000 deposition *(see* Tr. 747) that he personally does not know if Leucadia was responsible in any way for GECC's decision to decline financing, and does not know of any fact which would lead him to believe that Leucadia was responsible. (Tr. 6/22/2000, at 130-31).

The Plaintiffs also assert other arguments that the Court does not find persuasive. Among them are that Hershfield was so biased as a consequence of a profit-participation agreement that he has with Leucadia that he deliberately set out to sabotage the Breslin transaction.[11] Court found Hershfield to be a very credible witness, despite his personal "profit participation" in the transaction. Indeed, all of the witnesses, except perhaps Mr. Breslin himself, were very credible. A review of their recollections of conversations and

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[10] To the extent there is anything in the record, it is that Breslin's litigation history with its lenders, may have played a role in GECC's decision to not fund the proposed financing. *See* Def. Exh. 80.

[11] The Plaintiffs introduced testimony and evidence showing that Hershfield stands to gain financially if Leucadia is successful in obtaining the alleged equity in the Breslin properties at issue in this case. Trial Tr. at 22-25. The agreement shows, however, that it was entered into between Leucadia without regard to this particular transaction and that he stood to receive incentives even if the transaction with the Breslin Entities was successfully completed by having had the Ventures organized and funding. In other words, the agreement is not one that is peculiar to the Plaintiffs' transaction and is only relevant if, as Plaintiffs argue.their equity is wiped out.

events shows that, with the exception of Mr. Breslin, they recalled essentially the same.[12]

Plaintiffs also contend that Leucadia breached the July 2nd Agreement by failing to agree to recourse terms and guarantee the new financing, or otherwise allow lenders to rely upon Leucadia's financial strength in determining whether to make the $34 million first mortgage loan. Trial Tr. at 56, 311; *see, e.g.*, Hershfield's testimony acknowledging that Leucadia is worth over $1 billion. The record shows that Hershfield testified that when discussing the potential financing with Ramius, he did not tell Ramius that Leucadia would guarantee repayment of the funds, Tr. at 56. Similarly, he did not suggest to Ackman that Ackman was permitted to tell lenders that. "Leucadia was ready to sign for the loan." Trial Tr. at 89. Nor did Leucadia call upon its line of credit with Chase to fund the financing. Trial Tr. at 92. None of these events, however, support a finding that Leucadia breached the terms of the July 2nd Agreement.

To the contrary, the Court finds that the July 2nd Agreement did not require Leucadia to consent to financing which might contain provisions allowing the proposed lender recourse against Leucadia, and not just against the collateral, in the event of default. At best, the agreement is silent as to whether the $34 Million financing should be recourse or non-recourse as to Leucadia. Plaintiffs' counsel argued in

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[12] As one example, all the parties - except Mr. Breslin - recall quite clearly that the subject matter as to whether or not Leucadia should be charged rent as the assignee of the lease in Bay Harbour was never discussed. *See* testimony of Schackner, Herschfield, Hornstein; *cf.* testimony of Breslin on this subject.

closing that unless there is non-recourse language in the agreement, the usual and customary commercial activities relating to mortgages controls, and, according to counsel, the usual and customary activity is that the borrower has a personal obligation. These arguments are not, however, supported by either the trial record or the briefs. More importantly, a reasonable interpretation of Paragraph 2 of the Agreement, titled "New Financing," is that the agreement contemplated that the $34 Million financing would be non recourse as to Leucadia. Specifically, paragraph 2.1 provides that "The new First Loan shall be a commercially reasonable, market rate first mortgage loan *secured by liens upon certain of the Properties* ... and cross-collateralized as to the entire cumulative total outstanding from time to time, anticipated to be approximately $34 million." By referring solely to liens against property, the agreement by omission evidences the parties' intent that the proposed lender's sole recourse would be as against the Properties, and not as against Leucadia. Further, paragraph 1.2(b) makes clear that the borrower would be the *Ventures,* not Leucadia. In addition, the Court agrees with Leucadia that it would turn the agreement on its head to hold that Leucadia acted in bad faith by not procuring financing in which *it* would essentially be the borrower. The intent of the Agreement, as gleaned from its four corners, is that the $34 million owed to Leucadia by the Debtors would be paid off and that Leucadia would be taken out as a lender to the transaction. It does not support an intention by the parties that Leucadia would, in essence, take out a new loan on which it was personally obligated in order to pay itself off. Thus, Leucadia's failure to obtain or agree

to such recourse financing was not a breach of its contractual obligations.

Nor have the Plaintiffs established, by a preponderance of the evidence, that Leucadia breached its obligations to act with the Plaintiffs to obtain financing. With respect to the GECC loan, nothing in the record suggests that GECC did not go forward with the loan due to any action or inaction on Leucadia's part. Counsel opened this case by arguing that the Debtors would establish at trial that *but for* the alleged delay in execution of the loan application, the GECC would likely have closed. This, they have not done. Plaintiffs have not established any improper delay on Leucadia's part. The Plaintiffs have not established any obstruction of the loan process. And even if they had shown either of the foregoing, there is *nothing* in the record with respect to the likelihood that the loan would have closed but for any of these events. Leucadia has shown that it did, in all respects, cooperate in the loan process and did fulfill its own obligations to try to locate financing. That they were unsuccessful is not a breach of the July 2nd Agreement.

For all these reasons, the Court finds that Plaintiffs have failed to satisfy their burden as to Count 3 of the complaint. For the same reasons, and because the Court finds above that December 15, 1999 was a deadline by which the financing must be in place, Plaintiffs have not established that they are entitled to the specific performance they seek in Count 4. Contrary to their representation to the Court in the December 20, 1999 Disclosure Statement that Leucadia diligently attempted to locate a lender, Plaintiffs have attempted to establish that Leucadia obstructed the lending process and that but

for that obstruction, the financing would be in place. The Court concludes that they have not done so by a preponderance of the credible evidence.

Count 5 of the Cm/plaint (Specific Performance - Consensual Foreclosure)

Count 5 seeks specific performance of ¶1.4 of the agreement - specifically, a judgment directing Leucadia to foreclose upon the properties in a consensual foreclosure "and, thereafter, convey the Properties to Ventures owned by Plaintiffs and Leucadia." Plaintiffs rely upon a letter, dated December 14, 1999, from the Debtors to Leucadia. *See* Pl. Exh. 2.. The letter states in full:

> Gentlemen:
>
> Pursuant to Section 1.4 of the above-referenced Agreement, we hereby request that Leucadia foreclose the Cargill Loans (as defined in the Agreement) in a consensual foreclosure in furtherance of the restructuring contemplated under the Agreement, and thereby cause the properties covered by such foreclosure to be conveyed to the appropriate Venture (as defined in the Agreement).
>
> This request is made without prejudice to any other rights or remedies the Breslin Entities may have under the Agreement, at law or in equity.

Leucadia (by Hershfield) responded to this demand with a letter (Pl. Exh. 3) stating, in pertinent part:

> As you know, that provision was inserted at your specific request in order to assist you in the event one or more of your existing partners refused to cooperate with the restructuring. To utilize this provision in an attempt to circumvent the other specific requirements of the letter agreement is certainly contrary to the spirit in which we entered into that agreement.
>
> However, more importantly, your request is, under the circumstances, contrary to the terms of the agreement. Any such consensual foreclosure must be "in furtherance of the restructuring contemplated" under the agreement. The restructuring is outlined in paragraphs (a) through (e) of Section 1.2 of the agreement. The new first mortgage (item (b) of Section 1.2) is not in place (and will not be in place by the agreed-upon deadline of December 15th).
>
> Since it is clear that no funds will be available on December 15th, a consensual foreclosure will not be in furtherance of the restructuring and therefore you are not entitled to the actions you request under the terms of the agreement.

The Debtors contend that Leucadia's failure to commence and effectuate the consensual foreclosure as demanded by them in their December 14, 1999 letter and thereafter convey the Properties to the "appropriate Venture" is a breach of the July 2nd Agreement.

The Court agrees with Leucadia's assertion that the mere demand by the Plaintiffs for "consensual foreclosure" as was made in their December 14th letter (Pl. Exh. 2) does not entitle them, without more, to the relief sought. The Plaintiffs concede, as they must - indeed, they affirmatively argue -- that the ventures were not in place. For example, at the July 13, 2000 hearing on the motions *in limine,* the Court inquired of Plaintiffs' counsel as to how the Debtors defined the joint ventures. The following colloquy took place:

> [Plaintiffs' Counsel]: Each of the ventures, independently. So that the five entities - I believe it's five . . . there are five parcels of real property that are involved, each right now independently owned by a different debtor. The ventures, since there haven't been five ventures that have been presented for execution, even as of this date, which is not part of this motion, but we would show that Leucadia, even though they had the same obligation as Breslin, they haven't provided five entities, be it the limited partnerships or limited liability companies, they have not provided them for signature by anybody nor have the terms and conditions ever been properly negotiated. We say the ventures are the new ventures, which will consist ... of Leucadia, Luk Shop or its designee owning 50 percent, and the Breslin debtor entities owning the other 50 percent, and at that moment, contemporaneous with the delivery of those deeds from a referee in foreclosure to the ventures, the balance of the monies will be paid to Leucadia. And the joint ventures

> continue from that point on, as was contemplated by this agreement....
>
> The Court: Do you believe that the agreement permitted the parties to, for instance, restructure the property such that there might only have been one, two, three ventures, Le., less than five?
>
> [Plaintiffs' Counsel]: Absolutely. Except that was from day one two sides, as we are now; one sitting to my left the rest of us sitting to my right, and the fact is that hasn't been resolved. But there is clearly provision, it could have been one entity; it could have been more than one entity, but that hadn't been resolved ....

July 13, 2001 Tr. at 14-16.

The clear inference from the above colloquy, as well as that which logically arises from the provisions of the July 2nd Agreement, is that the parties intended to provide as much flexibility as required to enable the implementation of the restructuring and refinancing of the Properties. There could have been one or more Ventures created, depending upon which properties were required to serve as recourse collateral to a potential funder.

The "schizophrenia" within the Plaintiffs' arguments is that they recognize, as they must, that the ventures have yet to be created and yet assert that this Court must direct specific performance by ordering Leucadia to commence "consensual foreclosure" and thereafter convey the foreclosed properties into the appropriate venture. This could not have

taken place on December 14, 1999 and cannot take place today. It makes no sense, as Leucadia recognized in its December 15, 1999 letter, to undertake an act that is futile. How can Plaintiffs plausibly argue that Leucadia was obligated to transfer properties into non-existent entities? Which one of the numerous "Cargill Loans" were to have been foreclosed?

The undisputed testimony at trial, most of which was introduced by the Plaintiffs, establishes that no operating agreements were ever executed, despite the fact that Leucadia's counsel drafted them, and their form was agreed upon between the parties. The Plaintiffs further established, as previously noted, that no joint venture entities, whether in the form of partnerships or limited liability corporations or some other, were ever formally formed. No explanation was offered as to why none were formed, except for the potentially adverse tax considerations referred to by Schackner. While Breslin's December 14th letter demanded that Leucadia cause the properties "to be conveyed to the appropriate Venture (as defined in the Agreement), " there is no basis for concluding that-this could have been accomplished either-then or-now.

In addition, Breslin's December 14'h letter demands that Leucadia "foreclose the Cargill Loans (as defined in the Agreement)." The agreement derIDes the Cargill Loans as "the existing first mortgage financing outstanding and owed by the Breslin entities named as addressees above ... to the Cargill Entities. ... " One only need look to the Estoppel Certificate, dated July 9, 1999 (Defs.' Exh. 5), which was executed by the Debtors to induce Leucadia to purchase the loans from Cargill, to see the illusory nature of the Plaintiffs'

demand in the December 14th letter. The certificate refers to "Certain loans in the aggregate amount due and owing of approximately $90,000,000 (collectively, the "Loans"), which Loans are secured by the documents listed on Exhibit A attached hereto. ... " Exhibit A consists of an 18-page list of loan documents -- a variety of letter agreements, mortgage promissory notes, modification agreements, mortgage consolidation and spreader agreements, security agreements, guarantees -in varying amounts, varying priorities and encumbering six separate properties. Which of the mortgages was Breslin asking Leucadia to foreclose upon? All? Only those which were "first" mortgage loans? Breslin's December 14th letter merely parrots the words of ¶1.4 of the July 2nd Agreement and that is not, under the words of that same provision, sufficient.

On July 13, 2000, the Court rendered the following ruling in connection with the motions *in limine,* that

> it is not sufficient, as the plaintiff debtors request this Court to so rule, that all that is required in order to oblige Leucadia to undertake the consensual foreclosure is to have the Breslin entities so request the same by way of an instrument, such as [the December 14th letter] .-Rather the-Court believes that the obligation of Leucadia to foreclose anyone or more of the Cargill loans in a consensual foreclosure, in furtherance- of the restructuring contemplated under this agreement, requires that obligation be read in the context of the agreement, and that it is not simply sufficient that a request be made. The Court believes that there are material is-

> sues of fact as to whether or not the restructuring contemplated under the agreement had come into sufficient existence, for instance, as of the point in time of the request. ... Clearly, Section 1.2 together with 1.3, 1.4 and 13, refer to a process.

Tr. of July 13, 2000 at 41-42. The Court now finds, consistent with its prior ruling, that all provisions of the Agreement must be read together, that the restructuring as contemplated by the agreement had *not* come into sufficient existence so as to obligate Leucadia to comply with Breslin's December 14th letter request for consensual foreclosure of unidentified loans into non-existent and unidentified entities. The Court also finds, contrary to the Plaintiffs' urging at trial, that Leucadia did not improperly obstruct the formation of the joint venture entities. Leucadia's attorneys began preparing the operating agreements "fairly soon" after the July 2nd Agreement closed. Trial Tr. at 169. A draft was sent to Beth Alderman at Breslin Realty. *Id.* The agreements were prepared to the point where "they were ready to be signed." Trial Tr. at 171. Thus, while the Plaintiffs proved that the agreements had not been executed or otherwise in place, the record remains essentially silent as to why that was so. *But see* Def. Exh. 38 (a letter, dated Sept. 27, 1999, from Paul Berger of Breslin Realty Development Company to Hershfield which states in part that if "Leucadia were to act as both lender and joint venture member the transaction could readily be construed to be a sale which would immediately have a negative impact upon Ron Pecunies and Easa Easa"); *see also* Schackner testimony regarding the potentially adverse tax consequences; Trial Tr. at 175-76.

Given that Leucadia drafted the agreements, forwarded them to Breslin for comment, negotiated their terms, and had final versions in place, it seems much more likely that the agreements were not signed not because of any nefarious intent on Leucadia's part, but rather due to tax concerns on Breslin's part. Nevertheless, insofar as Count 5 is concerned, all that is relevant is that the evidence shows that the joint venture entities were never formed and the operating agreements never executed. In the absence of the Plaintiffs proving by a preponderance of the evidence that the restructuring "process" contemplated in ¶1.2, 1.3 and 1.4 was sufficiently advanced to ¶¶ permit Leucadia to foreclose and convey the properties into the "appropriate ventures the Court concludes that Leucadia was not in breach of the Agreement by declining to perform the Plaintiffs' request.

Moreover, there was testimony at trial, and a reading of the Agreement confirms, that the agreement left open the possibility of a simultaneous transaction, whereby the closing on the "new financing, he execution of operating agreements and formation of joint venture entities, and the transfer of the properties into those entities -- might take place at the same time. Thus, the Court does not believe-that a fair reading of the agreement allows for Breslin to send a letter demanding a foreclosure and thereby bind Leucadia to foreclose its liens, take title to the properties, and to contribute them to a joint venture in which they only were to have a fifty percent interest (essentially, to give half their interest in the properties to Breslin), when they had not been paid anything on their $34 million debt. The Agreement clearly contemplates that Leucadia's equity contribution to the joint venture was to be limited to $4 million.

Moreover, the Court rejects Plaintiffs' argument that its ruling renders the last sentence of paragraph 1.4 meaningless. Debtors argue that in order to foreclose, a creditor such as Leucadia "must have a debt remaining unpaid to be recovered by way of the foreclosure. If the refinancing had occurred before the consensual foreclosure was requested, [Leucadia's] present mortgage would be satisfied and it would be incapable of complying with its obligation to pursue a consensual foreclosure. Stated otherwise, the refinancing would wipe out Defendants' mortgage and there would be nothing to foreclose." Pl. Post-Trial Mem. at 16-17. The Court disagrees. The July 2nd Agreement refers to and contemplates *several* debts owed to Leucadia - not solely the $34 million expected to be retired by financing. For instance, the Agreement provides that the parties would obtain a "First Loan" ¶1.2) in the approximate amount of $34 million. The Agreement also provides that Leucadia would convert its interest in the Cargill Loans to "Second Loans" in the approximate amount of$ll million. The remaining $4 million of the purchase price which Leucadia had paid to Cargill ($49 million) was to have been Leucadia's equity contribution to the joint ventures. Further, ¶1.4 provides that after the closing on the Agreement, "no rights exist to acquire the Cargill Loans for any amount less than the accrued and unpaid debt under the Cargill loans" (which, at the time, was approximately $92 million). Viewing the Agreement at the time that it was drafted, it is therefore far from clear that had the $34 million financing been in place on December 15, 1999, that the Defendants' mortgage(s) would be "wiped out." At the time the agreement was written, and even now, the last sen-

tence retains meaning, even if the new financing were in place.

CONCLUSIONS

This Court has jurisdiction over the parties and the subject matter, and venue is proper.

On the first claim for relief, Plaintiffs have failed to prove, by a preponderance of the evidence, that the July 2nd Agreement did not require Plaintiffs to obtain refinancing by December 15, 1999. The Defendants are entitled to a judgment in their favor declaring that the Agreement required such financing to be in place by December 15, 1999 and that it was not in place by that date.

On the second claim for relief, Plaintiffs have failed to prove by a preponderance of the evidence, that there was a fiduciary duty owed by Defendants to Plaintiffs, and have also failed to prove that even if such duty existed, Defendants were in breach. The Defendants are therefore entitled to a judgment in their favor with respect to this second cause of action.

On the third claim for relief, Plaintiffs have failed to prove by a preponderance of the evidence that Defendants are in breach of the July 2nd Agreement. The Defendants are therefore entitled to a judgment in their favor with respect to this third cause of action.

On the fourth claim for relief, Plaintiffs have failed to prove by a preponderance of the evidence that they are entitled to judgment directing Leucadia to specifically perform under paragraphs 1.2 and 6 of the July 2nd Agreement. The

Defendants are therefore entitled to a judgment in their favor with respect to this fourth cause of action and Defendants' affirmative defense is sustained.

On the fifth claim for relief, Plaintiffs have failed to prove by a preponderance of the evidence that they are entitled to require the Defendants to undertake a consensual foreclosure as referred to in paragraph 1.4 of the July 2nd Agreement and to convey the properties at issue to joint ventures. The Defendants are therefore entitled to a judgment in their favor with respect to this fifth cause of action and Defendants' affirmative defense is sustained.

On Defendants' counterclaim, Defendants are entitled to Judgment declaring that since Plaintiffs failed to comply with the express conditions of the July 2nd Agreement, the Defendants are entitled to enforce all of the rights and remedies available to them as the holder of the Cargill loans. The Defendants are therefore entitled to a judgment in their favor with respect to their counterclaim.

Separate judgment is entered this date.

HON. MELAN CYGANOWSKI
United States Bankruptcy Judge

DATED: Hauppauge, New York
August 4, 2000

APPENDIX H – LETTER DATED DECEMBER 14, 1999

Wilbur F. Breslin, Bay Harbour Associates, L.P.,
Huntington Square Associates, L.P., Busy Bee Associates, L.P.,
Verleye & Jericho Associates, L.P., Rochester Associates, L.P.,
Riverwood LaPlace Associates, L.L.C.,
Breslin Realty Associates, Breslin Realty Associates, L.L.C.,
and Breslin Realty Development Corporation
500 Old Country Road
Garden City, New York 11530

December 14, 1999

Leucadia, Inc.
Luk-Shop, Inc.
315 Park Avenue South
New York, New York 10010

Re: Agreement dated July 2, 1999 (the "Agreement") by and between Leucadia, Inc. ("Leucadia") and Wilbur F. Breslin, Bay Harbour Associates, L.P., Huntington Square Associates, L.P., Busy Bee Associates, L.P., Verleye & Jericho Associates, L.P., Rochester Associates, L.P., Riverwood LaPlace Associates, L.L.C., Breslin Realty Associates, L.L.C., Breslin Realty Associates, L.L.C., and Breslin Realty Development Corporation (collectively, the "Breslin Entities")

Gentlemen:

Pursuant to Section 1.4 of the above-referenced Agreement, we hereby request that Leucadia foreclose the Cargill Loans (as defined in the Agreement) in a consensual foreclosure in furtherance of the restructuring contemplated under the Agreement, and thereby cause the properties covered by such foreclosure to be conveyed to the appropriate Venture (as defined in the Agreement).

This request is made without prejudice to any other rights or remedies the Breslin Entitles may have under the Agreement, at law or in equity.

Very truly yours,

BAY HARBOUR ASSOCIATES, L.P. by
BAY HARBOUR CORP., a Delaware
corporation, its General Partner

By:_____
Name: Wilbur F. Breslin
Title: President

RIVERWOOD LAPLACE ASSOCIATES
LLC, a New York limited liability company

By: _____
Name: Wilbur F. Breslin
Title: Manager

HUNTINGTON SQUARE ASSOCIATES, L.P.
by HUNTINGTON SQUARE CORP.,
a Delaware corporation, its General Partner

By:_____

Name: Wilbur F. Breslin
Title: President

BUSY BEE ASSOCIATES, L.P. by
MASSAPEQUA BUSY BEE CORP., a Delaware
corporation, its General Partner

By:_____
Name: Wilbur F. Breslin
Title: President

VERLEYE & JERICHO ASSOCIATES, L.P.
by VERLEYE & JERICHO CORP., a Delaware
corporation, its General Panner

By:_____
Name: Wilbur F. Breslin
Title: President

BRESLIN REALTY DEVELOPMENT
CORPORATION, a New York corporation

By:_____
Name: Wilbur F. Breslin
Title: President

BRESLIN REALTY ASSOCIATES, a New
YORK general partnership

By:_____
Name: Wilbur F. Breslin
Title: President

BRESLIN REALTY ASSOCIATES, L.L.C.
a New York limited liability company

By:_____
Name: Wilbur F. Breslin
Title: Manager

ROCHESTER ASSOCIATES, L.P.
by HYLAN ASSOCIATES CORP.,
a Delaware corporation, its General Partner

By:_____
Name: Wilbur F. Breslin
Title: President

APPENDIX I – AGREEMENT, DATED JULY 2, 1999

Leucadia, Inc.
315 Park Avenue South
New York, New York 10010

July 2, 1999

Wilbur F. Breslin
Bay Harbour Associates, L.P.
Huntington Square Associates, L.P.
Busy Bee Associates, L.P.
Verleye & Jericho Associates, L.P.
Rochester Associates, L.P.
Riverwood LaPlace Associates, L.L.C.
Breslin Realty Associates
Breslin Realty Associates, L.L.C.
Doyle Realty, L.L.C.
and Breslin Realty Development Corporation
500 Old Country Road
Garden City, NY 11530

Re: Agreement for Cargill Financial Services Corp and CFSC Capital Corp. XXVII (the "Cargill Entities") Loan Acquisition and Restructuring

Gentlemen:

Leucadia, Inc. or one of its affiliates or designees ("Leucadia") is pleased to advise you that Leucadia agrees, subject

to all of the terms and conditions set forth in this letter, to (a) taking an assignment of your rights to acquire and acquiring the outstanding mortgage financing with respect to the addressees and the properties securing the outstanding financing from the Cargill Entities and (b) restructuring the ownership and financing arrangements with respect to each of the properties (the "Properties") securing the Cargill Loans (as hereinafter defined) and the debt, as follows:

1. Loans.

1.1 Acquisitions. The existing first mortgage financing outstanding and owed by the Breslin entities named as addressees above (the "Breslin Entities") to the Cargill Entities (the "Cargill Loans") will be purchased by Leucadia from the Cargill Entities for $49 Million. Upon the closing of the acquisition of the Cargill Loans as contemplated herein, Leucadia will (a) return to Wilbur F. Breslin the $1,500,000 deposit previously made by Wilbur F. Breslin with the Cargill Entities. (b) to the extent obtained from the Cargill Entities, return and assign to Wilbur F. Breslin all life insurance policies on Wilbur F. Breslin, and (c) release the lien of the Cargill Loans from the Doyle Court Property. The Breslin Entities hereby consent to the acquisition of the Cargill Loans from the Cargill Entities by Leucadia as contemplated herein.

1.2 Purpose. The purpose of Leucadia's acquisition of the Cargill Loans is to allow for a restructuring and refinancing of the Properties with the Breslin Entities as follows:

a. The Breslin Entitles will enter into new limited partnership or limited liability company arrangements (the "Venture(s)") with Leucadia such that the Breslin Entities would contribute 100% of their interests in the Properties (and the partnerships that own the Properties) (but not the Doyle Court Property) to the Venture(s) in exchange for fifty percent (50%) of the equity interest in the Venture(s) and Luecadia will own fifty percent (50%) of the equity interest in the Venture(s). The parties will proceed to establish the Venturers and make such contributions as promptly as possible. The material terms and conditions of the Ventures will be consistent with the terms and conditions of this agreement.

b. Leucadia and the Breslin Entities will obtain through the Venture(s) new cross collateralized first mortgage loans (the "First Loan") with respect to certain of the Properties in the approximate aggregate amount of $34 Million.

c. Leucadia will convert its interest in the Cargill Loans to new cross collateralized second mortgage loans (the "Second Loans") with respect to the Properties in the approximate aggregate amount at $11 Million (with the understanding that the Second Loans will be in a first position on the Properties not included in the First Loan).

d. The difference of $4 Million between (i) the aggregate total of the First Loan and Second Loans and (ii) the amount of Leucadia's purchase price of $49 million shall be Leucadia's equity contribution for fifty percent (50%) of the Venture(s).

e. The equity in the Venture(s) will then be owned fifty percent (50%) by Breslin and the Breslin Entities (including any existing unrelated partners that Breslin may have in any or all of the Breslin Entities) and fifty percent (50%) by Leucadia. Governance of the Venture(s) shall be divided equally in a fifty-fifty manner between the Breslin Entities and Leucadia, by two co-managing members, one designated by Breslin and one designated by Leucadia.

1.3 Interim Interest. Pending the implementation of the restructuring contemplated in Section 1.2 of this agreement and the acquisition of the New Financing contemplated in Section 2 of this agreement, interest on the $49 million advanced by Leucadia shall accrue interest as follows:

From the date of disbursement of the purchase price and until paid by the proceeds of the First Loan, but for not more than ninety (90) days, interest shall accrue on $34 million at the rate per annum equal to LIBOR plus 2.5%; after ninety (90) days, such rate shall become twelve (12%) percent per annum. From the date of disbursement of the purchase price and

until the (a) implementation of the restructuring of the ownership of the Properties as contemplated in Section 1.2 of this agreement (the "Restructure Date") and (b) the acquisition of the New Financing contemplated by this agreement, interest shall accrue on $15 million (less the amount of proceeds from the sale of the Properties owned by Busy Bee Associates, L.P., actually paid to Leucadia, if any) at the rate per annum of twelve (12%) percent. All accrued interest shall be the responsibility of the Ventures.

1.4 Forebearance. Leucadia will agree not to exercise any of the rights or remedies under the Cargill Loans, including prosecution of foreclosure actions, pending the Restructure Date, which must occur no later than December 15, 1999. If the Restructure Date has not occured by December 15, 1999, Leucadia shall be free to exercise any rights or remedies under the Cargill Loans. The Breslin Entities acknowledge that after the Closing Date no rights exist to acquire the Cargill Loans for any amount less than the accrued and unpaid debt under the Cargill Loans. From the Closing Date and until the Restructure Date, the Properties will be managed in the manner contemplated in Section 5 of this agreement. Notwithstanding the foregoing, if the Breslin Entities request that Leucadia foreclose any one or more of the Cargill Loans prior to December 15, 1999 in a consensual foreclosure in furtherance of the restructuring contemplated under this agreement, Leucadia will agree to do so and cause the properties covered by such consensual foreclosure to be conveyed to the appropriate Venture.

2. New Financing.

2.1 First Mortgage Loan. The new First Loan shall be a commercially reasonable, market rate first mortgage loan secured by liens upon certain of the Properties (the Properties owned by Busy Bee Associates, L.P. and Verleye & Jericho Associates, L.P. shall not be encumbered by the First Loans) and cross-collateralized as to the entire cumulative total outstanding from time to time, anticipated to be approximately $34 million. Leucadia acknowledges that the Properties owned by Busy Bee Associates are subject to a contract for sale, but Leucadia has not consented to, and is not obligated to consent to, such contract. Scheduled payments as they become due shall be primary to all payments with respect to the Second Loans and to any payments with respect to management of or to or for the benefit of the equity in the Venture(s).

2.2 Leucadia Second Mortgage Loan. The Second Loans will constitute second-in-priority mortgage liens against each of the Properties, subject only to the First Loan, cross collateralized with respect to the total aggregate amount outstanding, anticipated to be approximately $11 million. No distributions will be made to the equity interests in the Venture(s) until the Second Loans and all outstanding interest, costs, fees and payments related thereto have been paid in full. All cash flow in excess of amounts required to be paid or retained pursuant to the First Loan and amounts as are necessary for construction, improve-

ment or operation of the Properties pursuant to the terms thereof, will be used to pay the interest and retire the Second Loans. The Second Loans will provide that Leucadia must consent to the reinvestment of proceeds into the Properties in lieu of repayments of the Second Loans, subject to amounts required for the normal operation and maintenance of the Properties. In the event there is insufficient cash flow to pay the full interest due at any payment date (except the final maturity date), the shortfall will be added to the principal balance outstanding and will accrue and compound interest at 12% per annum as if it were an additional principal distribution.

2.3 Term of Second Loan. The Second Loans shall be paid in full no more than ten (10) years following the Closing Date (the "Maturity Date").

2.4 Interest.

a. Rate of Interest. The Second Loans shall bear interest at a compound rate of 12% per annum.

b. Calculation of Interest. Interest shall be compounded and accrued daily and payable quarterly. All interest payable on the Second Loans shall be calculated on the basis of a year consisting of three hundred sixty (360) days and the actual number of days elapsed.

3. Payments and Prepayments of Principal and Interest.

3.1 Quarterly Interest Payments. Except as otherwise provided below, the accrued interest on the principal balance of the Second Loans shall be payable quarterly beginning on October 1, 1999, and continuing on the first day of each successive January, April, July and October thereafter. The unpaid principal balance of the Loan and all accrued and unpaid interest thereon and any other sums due and owing to Leucadia by the Venture(s) and any other borrowing entity shall be due and payable in full on the Maturity Date. Interest for the period commencing on the Closing Date and ending on September 30, 1999 shall be due and payable on October 1,1999.

3.2 Prepayments. All or any portion of the Second Loans may be prepaid in whole or in part, at any time and from time to time upon five (5) days' prior written notice to Leucadia without any prepayment premium or penalty.

3.3 Default Rate; Late Charges. Except as provided in 2.2 above, the Second Loans shall include provisions for payment of (i) a default rate of interest equal to eighteen percent (18%) per annum, and (ii) a late charge equal to Five Cents ($0.05) for each whole dollar that is not paid within five (5) days after the date such amount is due.

4. Excess Cash Flow and Improvements. Assuming reasonable business plans are in place and the parties are otherwise in agreement, excess cash held by or for the benefit of the ownership of the Properties the Partnership

will be used to finance construction and improvement to the Properties. In the event there is insufficient cash flow to fund the improvements set forth in the forecast, and assuming that the leases and other conditions are in place to justify the construction or improvement of the properties as set forth in the forecast (and Leucadia agrees that such leases and conditions are in place) then Leucadia will fund the construction and improvements and add such funding to outstanding principal of the Second Loans. All cash flow from all the Properties shall benefit the Second Loans, subject to the scheduled payments due from time to time under the First Loan, and all proceeds from asset dispositions not paid to reduce the First Loan shall be applied to reduce the Second Loans and not distributed to any equity interest holder until the Second Loans are paid in full. Any such funds so distributed shall commence to bear interest at the interest rate from and upon the date of initial distribution thereof.

5. Management. Day to day management of the Properties in the Venture(s) shall be by the Breslin Entities, subject to normal operating performance criteria (such as a manually agreeable annual business plan) acceptable to Leucadia. A representative of Leucadia shall be part of the management team and work with the Breslin Entities with respect to management of the Properties. Management of the Properties and the Venture(s) shall allow and the Properties shall bear a management fee of five percent (5%) of revenues, allocable and payable three and one-half percent (3½%) to the Breslin Entities and one and one-half percent (1½%) to Leucadia. Management fees will be subordinated to debt service on the First

Loan and payment of interest on the Second Loans. Counsel for the Ventures shall be chosen jointly by Leucadia and the Breslin Entities. With respect to the Property known as Huntingdon Square Mall, Leucadia agrees that it will cooperate in the granting of reciprocal easements and a "no-fence" agreement to or for the benefit of adjoining land owners as long as the same will not adversely effect such Property. Leucadia acknowledges that Wilbur F. Breslin owns an economic interest in the Doyle Court Property and another adjacent parcel to the Weal of Huntingdon Square Mall. Leucadia hereby consents to the cross easements shown on Exhibit A annexed hereto provided that the same will have no adverse financial impact upon Leucadia. Wilbur F. Breslin and the Breslin Entities represent to Leucadia that in their professional judgment the granting of such cross easements will not adversely affect the Properties.

6. Governance. All matters not included within day to day management activity, including without limitation, financings or refinancings, property sales or acquisitions, construction contracts, material leases (covering 25,000 square feet of space or more) and the like ("Significant Matters") shall require approval of a majority of the equity or ownership interest in the Venture(s). Any commissions on significant new leases anticipated to exist as of the date hereof must be reflected in the budgeted cash flows forecasted with respect to the Properties. Any leasing commissions which may be sought by any Breslin Entities, employees or entities related to or under common, control with any of the Breslin Entities and any overhead allocation therefor must be negotiated and

agreed upon in advance by Leucadia; provided that the parties agree that normal, market rate commissions will be acceptable. Additionally, no commissions will be paid to Wilbur F. Breslin personally.

7. Costs Payables. The parties agree that all amounts in the partnerships' and Properties' reserve funds, operating funds, unbilled common area maintenance charges, tax bills and other tenant reimbursables and all receivables due to the partnerships or the Properties, and all other rights, interests, assets in the name of Breslin, the Breslin Entities or the Properties shall be retained and be contributed as part of the assets of the Venture(s), The Venturers shall pay the administrative expenses of the current bankruptcy proceedings (excluding attorney's fees) and all payables (excluding attorneys' fees due to Shaw, Licitra, Bohner, Esernio & Schwartz, P.C. incurred in connection with the Cargill litigation and in connection with the Riverwood LaPlace bankruptcy prior to June 24, 1999) due to bona fide unrelated third parties. Notwithstanding the foregoing, the Ventures shall pay all reasonable attorney's fees allowed in the current bankruptcy proceedings of the Breslin Entities which were incurred since June 24, 1999 (the date of filing of such proceedings). The Venturers shall also pay a total of $580,000 in accrued attorney's fees to Shaw, Licitra, Bohner, Esernio & Schwartz P.C. (including fees incurred in the Riverwood LaPlace bankruptcy). The payment of legal fees, if any, due to such firm or to any other firm in excess of such amount shall be paid by the Breslin Entities.

8. Transfers. Either party shall be allowed to transfer, assign or sell its interest in the Venture(s) to a related entity or a family member for the purpose of tax and business planning activities only. Otherwise, neither party shall be allowed to sell, assign, transfer or set over unto any other party any portion of its interest in the Venture(s) unless the other party receives the same offer and an opportunity to consider and accept that offer for not less than ten (10) business days. These rights shall attach to each subsequent transfer, sale, or assignment of any interest held by either party or its purchasers, transferees or assigns. Notwithstanding the foregoing, Wilbur F. Breslin must be the controlling person, or the president of the sole foregoing, Wilbur F. Breslin must be the controlling person, or the president of the sole corporate general partner, of each Breslin Entity, except that in the event of the death or incapacity of Wilbur F. Breslin, Kenneth Breslin must be such controlling person or president.

9. Rights of Sale. Commencing upon the first day of the thirty-seventh (37^{th}) month after the Closing Date hereunder, and continuing annually thereafter, either party shall have the right to demand that anyone or more of the Properties be sold at the highest possible available and attainable price. Each party shall also have such right in the event the New Financing is not in place on the Properties by December 15, 1999. In the event of any such sale, either party shall have the right to bid for and acquire the Properties from the Venture(s) upon market terms and conditions.

10. Conditions of Closing. As a condition precedent to the closing of the restructuring transaction contemplated hereunder, on or before the Closing Date the Breslin Entities must deliver the following documents in the manner and in form and substance satisfactory to Leucadia:

10.1 Title Insurance. Evidence that a title insurance company satisfactory to Leucadia is prepared to issue to Leucadia assignment of mortgage endorsements satisfactory to Leucadia as the subsequently insured party and ensuring that the Cargill Loans have been properly assigned to Leucadia and the lien thereof as first and prior liens upon the Properties.

10.2 No Material Adverse Change. Evidence that as of the Closing Date, there has been no material adverse change in the financial condition, operations or physical conditions of the Properties or the financial condition of the Breslin Entities since the date hereof.

10.3 Receipt Review and Approval of Documents. Receipt, review and approval by Leucadia of all documents, instruments and arguments evidencing or delivered in connection the Properties, the Cargill Loans, and any other documents, instruments or agreements as may be requested by Leucadia, including, but not limited to, the original executed copies of the promissory notes evidencing the Cargill Loans and the documents securing those loans or appropriate lost document affidavits executed by

Cargill and acknowledged as acceptable and satisfactory by the Breslin Entities. Additionally. documentation of the Second Loans shall be satisfactory to Leucadia in its sole discretion.

10.4 Endorsement of Notes. Evidence that the Cargill Loans have been endorsed to Leucadia (or endorsed in blank and delivered to Leucadia accompanied by the original Notes).

10.5 Releases. Pull and complete releases of the Cargill Entities (and the Breslin Entities must receive a limited release from the Cargill Entities in the form agreed to by the Cargill Entities and the Breslin Entities).

11. Choice of Law. This agreement and the documents evidencing it shall be governed by the laws of the State of New York.

12. Closing Date. The parties agree that the date of closing of the acquisition of the Cargill Loans shall be no later than July 9, 1999 (the "Closing Date"). Closing shall take place in the City of New York, New York at the offices of Leucadia or such other place as Leucadia deems reasonably necessary and appropriate. All costs of closing shall be borne by the Ventures, except that each party shall pay the fees and expenses of its own attorneys. In connection with the closing, the parties agree to cooperate with each other so as to minimize the tax consequences of the contemplated transaction, as long as the same will not jeopardize such transaction. In addi-

tion, after closing the Ventures shall pay a fee in the aggregate amount of $500,000 to Glenn Myles for brokerage and finders services.

13. Entire Agreement. This agreement represents the entire agreement between the parties hereto with respect to the subject matter hereof and supersedes all prior oral and written agreements and commitments. This agreement is not a joint venture agreement and no joint venture, partnership or similar relationships shall exist between Leucadia and the Breslin Entities until the Ventures are formed, the Properties are contributed to the Ventures, and the indebtedness under the Cargill Loans has been restructured. This agreement is personal to the addresses and is intended solely for your benefit and not for the benefit of any third party. This agreement is not assignable by you. Time is of the essence of this agreement. The rights and obligations of the parties hereunder are subject to approval by the United States Bankruptcy Court for the Eastern District of New York, which currently has jurisdiction over the Breslin Entities and the Properties. The Breslin Entities agree to deal solely with Leucadia in connection with the transactions contemplated under this agreement.

14. Termination. The obligations of Leucadia under this agreement are subject to the performance by the Cargill Entities pursuant to a separate agreement entered into or about to be entered into by and between Leucadia and the Cargill Entities. In the event that Leucadia fails to acquire the Cargill Loans by noon, Eastern Daylight Time, on the Closing Date for any reason other than a

Cargill Breach (defined below), then the Breslin Entitles may by notice to Leucadia terminate this agreement, in which event neither party shall have any further liability or obligation whatsoever to the other. Notwithstanding the foregoing, the Breslin Entities shall have no right to terminate this agreement if the failure to close the acquisition of the Cargill Loans is due to any act or omission on the part of the Breslin Entities. In the event Leucadia fails to acquire the Cargill Loans by noon, Eastern Daylight Time, on the Closing Date due to the breach by the Cargill Entities of any of its obligations to Leucadia or any of its obligations under any settlement agreement in the bankruptcy proceedings (a "Cargill Breach"), then provided Leucadia has deposited $47.5 million with the Bankruptcy Court (the "Deposit") (or other escrowee mutually acceptable to both parties) by noon on the Closing Date, this agreement will not terminate and both parties will cooperate to petition the bankruptcy court to enter an appropriate order to cause the Cargill Entities to consummate such closing on an expedited and emergency basis. If Leucadia fails to make the Deposit by noon, E.D.T. on the Closing Date or if the bankruptcy court refuses to enter such an order, the Breslin Entities may be notice to Leucadia terminate this agreement, in which event neither party shall have any further liability or obligation whatsoever to the other.

15. Plan of Reorganization. The terms of this agreement will be incorporated in the plans of reorganization for the pending bankruptcy proceedings, provided, however, that Leucadia and the Breslin Entities reserve the

right to seek the dismissal of any one or more of such bankruptcy cases.

Please acknowledge your understanding and acceptance of the terms hereof by signing and returning a copy of this letter below and returning it to the undersigned.

LEUCADIA, INC.

BY: _____

Joseph A. Orlando
Vice President

(2)

No. 02-1730

JUN 27 2003

IN THE

Supreme Court of the United States

BAY HARBOUR ASSOCIATES, L.P., HUNTINGTON SQUARE ASSOCIATES, L.P., ROCHESTER ASSOCIATES, L.P., VERLEYE & JERICHO ASSOCIATES, L.P. and RIVERWOOD LA PLACE ASSOCIATES, L.L.C.,

Petitioners,

v.

LEUCADIA NATIONAL CORPORATION, LEUCADIA, INC. and LUK-SHOP LLC,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. Whether the three courts below correctly applied and interpreted well-established New York State common law contracts principles in finding that the plain language of the Agreement,[1] read as a whole, demonstrated that the parties intended the Agreement to be performed as a single integrated transaction that required the refinancing and restructuring of the Properties to be completed by an agreed upon deadline of December 15, 1999.

2. Whether the three courts below correctly found that Leucadia properly rejected Mr. Breslin's demand for a consensual foreclosure, made one day prior to the refinancing and restructuring deadline, when the Agreement permitted such demand only in furtherance of the restructuring contemplated by the Agreement, and on the date of the demand no commitment for refinancing had been obtained and the new Ventures had not been formed.

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1. All references to the agreement dated July 2, 1999 between Petitioners (sometimes referred to herein as the "Breslin Entities") and Leucadia, Inc., are made as "the Agreement."

STATEMENT PURSUANT TO RULE 29.6

Respondent Leucadia National Corporation has no parent corporation and no publicly held company owns 10% or more of its stock. Leucadia National Corporation is the direct corporate parent of Leucadia, Inc., and the indirect corporate parent of LUK-Shop, LLC. Leucadia National Corporation is the only publicly held company that owns 10% or more of Leucadia, Inc. and LUK-Shop, LLC.

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INTRODUCTION

Respondents Leucadia National Corporation, Leucadia, Inc. and LUK-Shop LLC (hereinafter, collectively, "Leucadia," except where context requires specific identification) respectfully submit that this Court should deny the Petition for a Writ of Certiorari because (1) it does not present an issue on which the circuits have issued conflicting decisions; (2) it seeks review of the court of appeals' fact-bound application of well-established state common law contracts principles; and (3) it does not present an important federal question. Rather, Petitioners devote their entire brief to the unremarkable (and incorrect) position that three lower courts misapplied well-settled New York State common law contracts principles – grounds upon which certiorari is "rarely granted." *See* Sup. Ct. R. 10.

The Second Circuit affirmed in whole the Judgment of the United States District Court for the Eastern District of New York (Hurley, J.) dated March 22, 2002, which affirmed, to the extent appealed from, the Judgment After Trial of the United States Bankruptcy Court for the Eastern District of New York State (Cyganowski, J.) dated August 4, 2002. Applying basic New York State common law contracts principles such as the parol evidence rule and reading contractual provisions in context of the entire agreement, the Bankruptcy Court completely dismissed the Breslin Entities' five-count complaint seeking, *inter alia* (i) a declaratory judgment that the agreement dated July 2, 1999 (the "Agreement") did not impose a December 15, 1999 deadline to obtain refinancing; and (ii) a declaratory judgment that Leucadia was obligated to agree to a consensual foreclosure to convey certain properties (the "Properties") to unformed Venture(s). The Bankruptcy Court granted

Leucadia's counterclaim for a declaratory judgment that the Breslin Entities' failure to obtain refinancing by the December 15, 1999 deadline entitled LUK-Shop LLC to enforce all of the rights and remedies available to it as a result of the Breslin Entities' failure to perform under the Agreement.

COUNTER-STATEMENT OF THE CASE

This adversary proceeding is a breach of contract action, nothing more, nothing less. It is not an action where the debtor seeks to assume or reject an executory contract or unexpired lease; it is not an action where the debtor seeks to enter into a post-petition contract; it is not an action to confirm a plan of reorganization. Simply stated, this breach of contract action required each of the courts below only to interpret New York State common law contracts principles, as provided in the Agreement itself. In doing so, each of the three courts below rejected the Petitioners' distorted interpretation of the Agreement, which would require that isolated provisions of the Agreement be read in a vacuum and that the full context of the Agreement, the trial testimony and other evidence in the record be ignored.

Petitioners now present a new argument to this Court based on an unsupportable and novel legal theory: that a garden variety breach of contract claim brought in an adversary proceeding should be treated as though it were a debtor's application for court approval to reject a pre-petition executory contract under the Bankruptcy Code (*see* 11 U.S.C. § 365). The obvious short-comings of such argument are highlighted further by the fact that it was the debtors who sought and obtained the Bankruptcy Court's approval to enter into the contract in the first place!

When the Agreement and the reasons why the Petitioners and Leucadia entered into it are put into context, it is readily apparent why the Petitioners' various interpretations of the Agreement have been correctly rejected by each of the courts below. Two weeks before they were about to forfeit the Properties to CFSC Capital Corp. VII ("Cargill") for failing to satisfy an agreed upon $49 million mortgage obligation, the Breslin Entities entered into the Agreement with Leucadia. The core of the Agreement provides that Leucadia would purchase from Cargill for $49 million the outstanding mortgage (the "Cargill Loans") owed by the Breslin Entities. Thereafter, the Agreement sets forth the steps of a single integrated transaction in which Leucadia would receive $34 million from a new cross-collateralized first mortgage loan obtained through to-be-formed Ventures by an agreed upon deadline of December 15, 1999. Thus, the Agreement saved the Breslin Entities from forfeiting the Properties to Cargill in July 1999 and gave them an additional six months in which to obtain financing.

The Agreement specifically states that no joint venture between Leucadia and the Breslin Entities would be formed until after the occurrence of three critical events: (i) the Venture(s) are formed; (ii) the Properties are contributed to the Venture(s); and (iii) the indebtedness under the mortgage has been restructured. (*See* Pet. 141a, § 13.)[2] The Agreement states that if refinancing and restructuring were not completed by the December 15, 1999 deadline, then Leucadia "shall be free to exercise any rights or remedies under the Cargill Loans," including foreclosing the mortgages and taking full

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2. References to the Petition for Writ of Certiorari are made as "Pet. __." References to the Joint Appendix filed in the Second Circuit are made as "A.__."

title to the Properties. (Pet. 131a, § 1.4.) The Agreement also permitted the Breslin Entities to "request that Leucadia foreclose any one or more of the Cargill Loans prior to December 15, 1999 in a consensual foreclosure *in furtherance of the restructuring contemplated under this agreement* . . . ." (*See* Pet. 131a, § 1.4) (emphasis added). The record shows, and the courts below found, that this consensual foreclosure provision was included as a "safety value" to complete the restructuring if one or more of Mr. Breslin's partners objected to the restructuring contemplated in the Agreement. (Pet. 117a-120a, 36a-37a.) There is, as the courts below found, no evidentiary or logical support for the proposition that a bald demand for a consensual foreclosure could be made as a means for the Breslin Entities to avoid the timely restructuring and refinancing required under the Agreement.

The record shows that by late October 1999 the refinancing that the Breslin Entities had hoped to secure through the to-be-formed Ventures fell through and no other potential refinancing agreements were in place. (A. 1112.) The Chief Financial Officer for the Breslin Entities admitted at trial that by that late date, it would have been "almost an impossibility" to locate a new potential lender willing to close a refinancing deal for the required sum by the December 15 deadline. (A. 730.) The record further shows that the Breslin Entities refused to restructure the Properties until after third-party refinancing was obtained through the to-be-formed Venture(s) because, if Leucadia were simultaneously a lender and an equity holder, Mr. Breslin and one or more of his partners would incur substantial tax liabilities. (A. 241, 1284-87.) Indeed, in their pre-trial brief, counsel for the Breslin Entities stated that the consensual foreclosure provision was envisioned as "a mechanism whereby, for tax reasons, the Properties would be transferred to the parties

joint venture *concurrently with obtaining the Refinancing Mortgage Loans*." (*See* A. 4, Docket Entry no. 9, Notice of Transmittal of Bankruptcy Papers to District Court, Plaintiff's Pre-trial Memorandum of Law, dated June 30, 2000, p. 15 (emphasis added).)

With the December 15, 1999 deadline looming and no refinancing agreement in place, the record shows that the Breslin Entities and their lawyers scrambled to find a solution to avoid forfeiture of the Properties, despite their failure to perform under the Agreement. (*See, e.g.*, A. 1364-366.) Mr. Breslin and his lawyers' collective attempt to devise a scheme to avoid foreclosure of the underlying mortgage and forfeiture of the Properties culminated in Mr. Breslin's demand – made one day before the December 15 refinancing and restructuring deadline – that Leucadia agree to a consensual foreclosure and a conveyance of the Properties to a non-existent Venture purportedly pursuant to section 1.4 of the Agreement. (A. 904.) The interpretation of the consensual foreclosure clause concocted by Mr. Breslin's lawyers after it became clear that the Breslin Entities would default under the Agreement would render meaningless the balance of the Agreement because a demand for a consensual foreclosure would be a substitute for the restructuring and refinancing required under the Agreement.

Recognizing the futility of the Breslin Entities' demand, Leucadia rejected it: no Venture(s) had been formed pursuant to the Agreement as of the date of the demand and no refinancing or commitments for refinancing were in place. (A. 1208.) The consensual foreclosure demanded by Breslin could not possibly be "in furtherance of the restructuring contemplated under the Agreement" without the formation of a Venture and the necessary refinancing in place.

When the December 15, 1999 deadline passed, LUK-Shop LLC was still owed approximately $34 million and, therefore, believed it could foreclose the balance of the Cargill Loans and take full title to the Properties. The Breslin Entities, however, contended that LUK-Shop LLC had to continue to wait for its $34 million and be forced to accept a 50% joint venture interest for the balance of its claim. This dispute gave rise to the present adversary proceeding.

After a four-day bench trial, the Bankruptcy Court issued a detailed 67-page Decision After Trial finding, *inter alia,* that (i) the Agreement was clear and unambiguous; (ii) all provisions of the Agreement must be read together; (iii) the Agreement set December 15, 1999 as the deadline by which the Breslin Entities were required to obtain refinancing; (iv) the Breslin Entities failed to obtain refinancing by the December 15, 1999 deadline; (v) the restructuring as contemplated by the Agreement had not come into sufficient existence to obligate Leucadia to comply with the Breslin Entities' demand for a consensual foreclosure; and (vi) as a result of the foregoing, Leucadia was entitled to exercise its rights and remedies under the Cargill Loans. (*See* Pet. 43a-121a.) Judge Cyganowski, the trial court judge, found all the witnesses at trial – *except* Mr. Wilbur Breslin (the Breslin Entities' principal) – to be credible, and described as "schizophrenic" the Breslin Entities' arguments that Leucadia somehow breached the Agreement and must consent to a foreclosure of the Properties to a non-existent Venture. (*See* Pet. 107a, 114a.) Judge Cyganowski also found that Mr. Breslin's own conduct and the conduct of the Breslin Entities' attorneys discredited the Breslin Entities' specious argument that December 15, 1999 was not a deadline to obtain refinancing. (Pet. 73a-74a.)

The Breslin Entities limited their appeal to the District Court primarily to the issue of whether Leucadia had the right to reject the Breslin Entities' demand for consensual foreclosure. (*See* Pet. 26a.) The District Court affirmed the Decision and Judgment of the Bankruptcy Court and expressly rejected the Breslin Entities' argument that Leucadia was required to agree to Mr. Breslin's demand for a consensual foreclosure, finding "that the consensual foreclosure language must be considered in conjunction with the verbiage which immediately follows, viz., 'in furtherance of the restructuring contemplated under this agreement.'" (Pet. 32a.) The Second Circuit affirmed in whole the District Court's Judgment, and denied the Breslin Entities' petition for a panel rehearing. (Pet. 1a and 3a.)

REASONS FOR DENYING THE PETITION

In their attempt to have this Court grant certiorari, Petitioners propose a novel application of Chapter 11 bankruptcy principles to garden variety breach of contract actions interpreted under state common law. The thrust of Petitioners' newly-minted argument is that courts should apply a pro-debtor gloss when presented with "two reasonable but conflicting interpretations" of an unambiguous contract. (Pet. i.) Petitioners hope that this Court will adopt this novel approach to interpret all contracts "entered into with the imprimatur of the Bankruptcy Court as blueprints for reorganization." (Pet. 6.) Petitioners argue for the first time in this action that "Chapter 11's purpose of rehabilitating the Petitioners" should prevail over the straightforward analysis of whether the Breslin Entities failed to satisfy their contractual obligations under an agreement governed by New York State law. (Pet. 4.)

It is respectfully submitted that the Petition for a Writ of Certiorari should be denied because the lower courts properly interpreted the Agreement under well-established state common law principles without the novel gloss proposed by Petitioner. Each of the three lower courts correctly rejected the Breslin Entities' interpretation of the Agreement as contrary to fundamental contracts law, which requires the parties' intent to be discerned by reading the contract as a whole, and by considering all its clauses together and in context to determine if and to what extent one may modify, explain or limit another. (Pet. 116a-117a (Bankruptcy Court), 31a-32a (District Court), 8a (Second Circuit).) Indeed, the evidentiary record weighs so heavily against the Breslin Entities' after-the-fact interpretations of the Agreement that their briefs to the lower courts and to this Court fail to cite to any portion of the record to support their bald conclusions, the ludicrous straw man arguments that they incorrectly attribute to Leucadia or "findings" that they incorrectly attribute to the courts below.

THE SECOND CIRCUIT CORRECTLY APPLIED WELL ESTABLISHED COMMON LAW CONTRACTS PRINCIPLES TO AFFIRM THE DISTRICT COURT'S JUDGMENT

The Second Circuit correctly saw this dispute for what it is – a garden variety breach of contract action. (Pet. 7a.) In doing so, the Second Circuit gave short-shrift to the Petitioners' interpretations of the Agreement and applied well-established common law contracts principles to find that "under the agreement, read as a whole, the Debtors had no right to consensual foreclosure absent new financing, and because the deadline had passed, Leucadia was free to pursue any remedies available to it under the notes it had purchased."

(Pet. 8a.) (citing *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 63 (1995) and *Kinek v. Paramount Communs., Inc.*, 22 F.3d 503, 509 (2d Cir. 1994)).

Failing to find any relevant authority to support their novel argument that the lower courts should have applied some sort of Bankruptcy Code gloss to their interpretation of a contract governed by New York State law, Petitioners instead rely on *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 104 S. Ct. 1188 (1984).

Petitioners' reliance on *Bildisco* is completely misplaced. In *Bildisco*, this Court examined two questions not even remotely related to any of the issues in this action:

> (1) under what conditions can a Bankruptcy Court permit a debtor-in-possession to reject a collective-bargaining agreement; (2) may the National Labor Relations Board find a debtor in-possession guilty of an unfair labor practice for unilaterally terminating or modifying a collective-bargaining agreement before rejection of that agreement has been approved by the Bankruptcy Court.

Bildisco, 465 U.S. at 516, 104 S. Ct. at 1191. In deciding those questions, this Court held that the phrase "executory contract" in 11 U.S.C. § 365 of the Bankruptcy Code includes collective-bargaining agreements subject to the National Labor Relations Act, and that the Bankruptcy Court may approve rejection of such contracts by the debtor-in-possession upon an appropriate showing. *Id.* at 516, 104 S. Ct. at 1191. This Court further held that, because of the special nature of a collective-bargaining contract, and the

consequent "law of the shop" that it creates, the Bankruptcy Court should apply a "somewhat stricter standard" in deciding whether to allow a debtor-in-possession to reject such an agreement. *Id.* at 523-24, 104 S. Ct. at 1195. The Court reasoned that, since "the policy of Chapter 11 is to permit successful rehabilitation of debtors, rejection should not be permitted without a finding that that policy would be served by such action." *Id.* at 527, 104 S. Ct. at 1196. The present case, however, does not involve approval of a debtor's rejection of a pre-petition executory contract.

In relying on *Bildisco* to support their novel legal theory, Petitioners have confused two strikingly different legal concepts: a debtor seeking court approval to reject a pre-petition executory contract to preserve its estate (*see* 11 U.S.C. § 365) *versus* a debtor breaching a court-approved post-petition contract by failing to perform its contractual obligations. Petitioners' attempt to apply Bankruptcy Code principles relating to pre-petition obligations to post-petition court-approved contracts is contrary to the case law interpreting the Bankruptcy Code. For example, in *In re Embrace Systems Corp.*, 178 B.R. 112, 122 (W.D. Mich. 1995), the Court refused to apply Section 365 to a postpetition contract, stating: "Section 365 does not govern the standards by which a debtor may enter into *new* contracts postpetition; rather, it sets forth requirements for a debtor to either assume or reject a contract that was already in existence prepetition and has not yet expired." *Id.* at 122 (italics in original).

In the present case, Petitioners sought and received permission from the Bankruptcy Court to enter into the post-petition Agreement with Leucadia. By entering into the Agreement, Petitioners avoided defaulting on their debt and

forfeiting their property to Cargill. The Agreement with Leucadia therefore gave Petitioners a second chance to obtain financing to avoid forfeiting their property.

Petitioners' argument that the Bankruptcy Court failed to give effect to Chapter 11's purpose of rehabilitating the Petitioners is belied by the record. When Petitioners sought the Bankruptcy Court's approval to enter into the Agreement, counsel for the Petitioners explained to the Court: "This agreement sets up the preliminary financing and then it provides a vehicle for the further financing which would be the financing that would take the debtors out of the bankruptcy proceeding." (A. 1557.) After counsel for Petitioners explained the details of the Agreement to the Court, the Petitioners were authorized to enter into the Agreement. (A. 1585, 1540-1542.) Accordingly, the Bankruptcy Court's order approving the Agreement promoted the Petitioners' attempt to rehabilitate and to reorganize.

By applying New York law (which governs the Agreement, *see* Pet. 140a, § 11), the courts below properly enforced the terms of the very agreement that the Petitioners sought and received permission to enter into. There is no policy reason to permit debtors to breach post-petition court-approved contracts. Indeed, quite the opposite is true: If post-petition contracts were to be interpreted in the manner suggested by Petitioners, third-parties would be disinclined to enter into them and that would obviously not promote the reorganization policy.

CONCLUSION

For the reasons set forth above, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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